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81-2213

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*, *Appellants*,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals Of The State Of North Carolina

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether North Carolina Public Records Law and Open Meeting Law, G.S. 132-1, 143-138.10 & 138.11, constitute a violation of a privacy right protected under the Constitution of the United States, and hence is invalid, inasmuch as they force the public disclosure of records of a non-stock, non-profit corporation organized under North Carolina law, and most specifically documents generated and discussions occurring in the course of litigation, covered at least in part by the attorney-client privilege, when, at the time each of the documents was generated, there was a reasonable expectation that these documents would remain private.

LIST OF PARTIES INVOLVED

Appellants include: Wake County Hospital System, Inc., Etta S. Creech, Marjorie B. Debnam, Curtis M. Thompson, Harvey L. Montague, J. T. Lindley, Odell C. Kimbrell, Jr., M.D., Rex G. Powel, M. Edmund Aycock, James Michael Weeks, and William F. Andrews, Sr.

Appellees include: News & Observer Publishing Company, a corporation, Frank A. Daniels, Jr., Claude Sitton, and Joye Brown.

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NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals
Of The State Of North Carolina

JURISDICTIONAL STATEMENT

Wake County Hospital System, Inc., et al., appeal from the final judgment of the North Carolina Court of Appeals decision which affirmed the judgment of a trial court compelling the appellants, a non-stock, non-profit corporation and officers and directors of that company to disclose certain documents, rejecting a claim that the disclosure of those documents, pursuant to applicable North Carolina statutes, was protected by a Federal Constitutional right of privacy and that the North Carolina statutes as so construed were repugnant to the Federal Constitution and hence invalid.

OPINIONS BELOW

The Judgment of the General Court of Justice, Superior Court Division, Wake County, North Carolina, filed January 7, 1981, is not reported. It is reprinted in the appendix hereto, App. 1a, infra.

The Opinion of the North Carolina Court of Appeals, filed December 1, 1981, is reported at 284 S.E.2d 542 and is reprinted at App. 6a, infra.

The North Carolina Supreme Court on March 3, 1982, denied a Petition for Discretionary Review without opinion. It is reprinted at App. 17a, infra.

JURISDICTION

The judgment of the North Carolina Court of Appeals, affirming a trial court judgment compelling Appellants to disclose certain documents, was entered on December 1, 1981 (App. 6a). A timely petition to the North Carolina Supreme Court for discretionary review was denied, without opinion, on March 3, 1982 (App. 17a).

A Notice of Appeal to this Court was duly filed in the North Carolina Court of Appeals on April 27, 1982 (App. 18a).

This appeal is being docketed in this court within 90 days from the denial of the petition for discretionary review below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

> Article VI and the First, Third, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution are set forth in full in the Appendix to this Jurisdictional Statement.

General Statutes of North Carolina:

> G.S. 132-1
>
> G.S. 143-318.1 & 318.2 (1971, c.638, s.1)
>
> G.S. 143-318.9 & 318.10 (1979, c.655, s.1)

G.S. 159-39(a)

are set forth in full in the Appendix to this Jurisdictional Statement.

STATEMENT OF THE CASE

This action was brought by the News and Observer Publishing Company, two of its officers, and one of its reporters (hereinafter usually collectively referred to as "The News") against the Wake County Hospital System, Inc., and its officers and directors (hereinafter usually collectively referred to as the "Hospital"), to force the Hospital to disclose to The News and to furnish to The News copies of certain documents concerning earlier litigation and certain financial reports and expense accounts. The facts of this dispute have been found by the courts below and are not in controversy.

The Hospital is a non-stock, non-profit corporation organized under North Carolina law. It was organized in 1965 by resolution of the Wake County Commissioners for the purpose of operating a hospital previously operated by the Wake County Hospital Authority. The County and the Hospital entered into an agreement under which the Hospital for $1.00 per year leased the hospital owned by the County for a renewable five-year term. In 1975 this lease was replaced by an operating agreement. Vacancies on the Hospital's board of directors are replaced subject to approval by the Board of County Commissioners and one County Commissioner serves *ex officio* on the Hospital Board. A separate agreement was entered into by which the County pays the Hospital for rendering care to the County's indigents. Upon dissolution or upon termination of the operating agreement, all assets of the Hospital are to be donated to the County to be used for the purposes for which the Hospital was formed. The County Board of Commissioners has the right to review and approve the Hospital's annual budget, to

have the Hospital records reviewed by an independent auditor, to furnish the County with copies of audited financial statements, to have a County representative attend Hospital meetings, review Hospital records, and make audits in connection with indigent records, to have the Hospital file with the County a schedule of charges and rates, to have the Hospital operated in accordance with standard practices for operating hospitals in North Carolina, and as provided in the operating agreement not to amend its articles of incorporation without prior County consent. Moreover, it was agreed that both the Hospital and the County understood that "none of the Trustees, officers, and employees of the [Hospital] is or shall be deemed to be an agent or employee of the County . . . ."

In December 1978, the Hospital was sued in three separate actions by three medical professional associations for alleged wrongful agreement to provide professional services. In August 1979, two of these actions were settled and dismissed before trial. The third suit was settled and dismissed in December 1979. A part of each settlement was an agreement that the terms of the settlement of each claim would not be released but would remain confidential.

The News sought access to inspect and to obtain copies of all records of the Hospital pertaining to those settlements. When the Hospital refused, The News brought this action claiming a right under the North Carolina Public Records Act, G.S. 132-1 to 132-9 to inspect and obtain copies of all documents of the Hospital pertaining to the settlements, including communications from counsel and minutes of meetings of the Hospital Board discussing the settlement including advice of counsel concerning these cases and proposals of settlement. Moreover, The News sought disclosure, and copies of, certain financial records including expense accounts for the preceding five years.

The suit was filed under the North Carolina Public Records Act, G.S. 132,[1] which provides for public access to any "public record" of any "public office, public officer or official . . . , institution, board, commission, bureau, council, department, authority or other unit of government of the State [of North Carolina] or of any county, unit, special district or other political subdivision of government." G.S. 132-1, 132-6. The Public Records Act specifically provides for public access to "written communications . . . made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action . . . ," except that such communications are subject to a three-year hiatus before becoming public records. G.S. 132-1.1.

The News moved for summary judgment. In opposition, the Hospital argued, *inter alia*, that the defendants in the action and the persons dealing with the Hospital[2] had a right of privacy in the confidential communications protected under the Federal Constitution and that the North Carolina statute construed to violate that right would render the statute invalid as repugnant

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[1] G.S. 132 is reproduced in full in the Appendix to this Jurisdictional Statement.

[2] The persons specifically mentioned were the three parties who had sued the Hospital and who had settled their cases with the Hospital, each with a specific agreement that the terms of the settlement would remain confidential and not be released. It should be noted that counsel for The News obtained and filed in the North Carolina Court of Appeals a Declaration from each of these parties stating that "he has no desire to become a party to the [present] action [then] on appeal to the North Carolina Court of Appeals . . . ." None of these Declarations purported to be a waiver of that party's right to privacy, a waiver of that party's contractual right as against the Hospital to have the terms of the settlement remain confidential, or any statement that the party had no objection to the information becoming public.

to the United States Constitution. The trial court granted the motion for summary judgment, holding that the documents sought were subject fully to disclosure under the North Carolina statute. The claim of the right of privacy under the United States Constitution was rejected without comment.

The Hospital and the other defendants filed a timely appeal to the North Carolina Court of Appeals, arguing, *inter alia*, that the order of the trial court violated "the reasonable expectations of privacy" of both the Hospital and the earlier litigants against the Hospital (Appellants' Brief to the N.C. Ct. of App., pp. 36-37) and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution (e.g. *id.* at 33). On December 1, 1981, the North Carolina Court of Appeals affirmed the judgment of the trial court, rejecting the constitutional arguments with only the general comment that "we have carefully examined the [Hospital] System's remaining arguments and assignments of error and find each to be without merit." (App. 16a.)

A timely petition to the North Carolina Supreme Court for Discretionary Review was denied, without opinion, on March 3, 1982.

A Notice of Appeal to this Court was filed in the North Carolina Court of Appeals on April 27, 1982 (App. 18a).

REASONS THAT THIS CASE SHOULD BE DECIDED

The right to privacy under the Federal Constitution is now well recognized, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Nixon* v. *Administration of General Services*, 433 U.S. 425 (1977). State statutes in contravention of that right cannot stand, for the privacy right is within the Fourteenth Amendment's concept of personal liberty. *Whalen* v. *Roe*, 429 U.S. 589, 598-99 (1977); *Griswold, supra*.

This case presents a claimed Federal Constitutional right to privacy in a context not before considered by this Court: where persons deal with a private, non-profit corporation later found to be a part of state government, and where in that connection they have generated documents with a reasonable expectation that those documents would remain private, only to have disclosure forced later by virtue of state statute. While this Court has not yet decided the issue of the right of privacy in this context, that general issue was presented in similar contexts previously to the courts of two states, Florida and California, and in each the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure. *City of Carmel-by-the-Sea* v. *Young*, 2 Cal. 3d 259, 85 Cal. Reptr. 1, 466 P.2d 225 (1970); *Byron, Harless, Schaffer, Reid & Assoc., Inc.* v. *State of Florida*, 360 So. 2d 83 (Fla. App. 1978). In the present case, the claimed federal right was rejected.

This Court has made it clear that an essential requisite of a Constitutional claim of disclosure privacy is that the claimant have a "legitimate expectation of privacy" in the particular information or communication in danger of disclosure by state action. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 458 (1977), citing *Katz* v. *United States*, 389 U.S. 347, 351-53 (1967). This "legitimate expectation of privacy" expresses the twofold requirement that, first, the claimant of the right of privacy exhibited an actual or subjective expectation that the information not be disclosed, and, second, the expectation is one that society recognizes as "legitimate" or reasonable. See *Katz*, 389 U.S. at 352. *Byron, Harless, Schaffer, Reid & Assoc., Inc.* v. *State of Florida*, 360 So. 2d 83, 94 (Fla. App. 1978).

The facts in this case show the existence of a "legitimate expectation of privacy." It was not until October 1, 1979, that North Carolina G.S. 143-318 was amended to apply to hospitals such as the Hospital in this action. Only then did G.S.

143-318.10 provide that the term "public body" shall include "the governing board of a 'public hospital' as defined in G.S. 159-39 . . . ." G.S. 159-39 states that the term "public hospital" include a "hospital that . . . (2) Is owned by a county . . . and operated by a non-profit corporation . . . a majority of whose board of directors or trustees are appointed by the governing body of a county . . . ."[3]

While it may be argued that the Hospital could have fallen within the Public Records Act before October 1, 1979, it is clear that North Carolina felt that it was necessary to enact legislation in 1979 to make the Hospital a "public body." It is also clear from the Judgment of the trial court in this case, App. 3a-4a, and from the opinion of the North Carolina Court of Appeals, App. 15a-16a, that both courts considered the 1979-enacted G.S. 143-318.10 and 318.11 significant to their conclusions, rejecting the argument that the disclosure statute "did not even apply to the Hospital as a "public body" during most of the "pertinent periods" involved in this case. (Appellant's Brief to Court of Appeals, p. 34.)

The facts are that the persons involved were dealing with what purported to be a private, non-profit corporation chartered, as are all corporations, by the state. Even the officers and directors of the Hospital could believe reasonably that they were associated with a private institution that was contracting with but not a part of the county government. The persons dealing with the Hospital could reasonably have had the same belief.[4]

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[3] While it may be argued, as it was in the state courts below, that the Hospital that is a party to this action is not within this definition, the finding by the courts below that the Hospital is a public body within the meaning of these interlocking statutes precludes that argument here.

[4] As noted previously (fn. 2, p. 5, supra) the three non-Hospital parties to the suits the confidential paper of which were ordered disclosed in this action have not waived their Constitutional rights of privacy. The Hospital, in possession of the documents sought, has standing to raise the privacy rights

Thus, when most of the documents ordered disclosed in this case were generated, there was a reasonable basis for an expectation by all involved that they were private documents that would remain private.

The suits the settlements papers of which the courts below ordered disclosed to the press were commenced eleven months *before* the enactment of G.S. 143-318.10 and 318.11, and in two of the three suits the entire settlement had been fully consummated before the amended statute took effect. The expense accounts ordered disclosed were to go back to 1975, more than four years before the amended statute took effect. [3]

That the parties intended that the papers involved be private is similarly clear. First, the settlement papers themselves state explicitly that the terms of settlement were to remain private and not to be released. But, even more fundamental, as the trial court recognized explicitly (App. 5a), at least some of the documents ordered disclosed come within the attorney-client privilege. Certainly, any person experienced enough to be an officer or director of a hospital must be expected to be aware of the attorney-client privilege and to expect that all matters falling within the privilege would remain private and confidential. And this Court has recently summarized the importance of the attorney-client privilege to our legal system. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). We respectfully submit that it is manifest that the attorney-client privilege is an area that falls within a "legitimate expectation of privacy." Yet, the courts below ordered the disclosure of such information, albeit with a three-year hiatus.

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of those absent parties, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), in addition to the privacy rights of the Hospital and its officers and directors.

[3] Indeed, even the audit report ordered disclosed on its face carries the date of September 30, 1979.

It is true that the courts below, applying the interlocking North Carolina statute, have found the Hospital to be a "public body" and as such subject to the Public Records Act. Once that finding is made, it is easy to say that one who is an officer or director of, or who deals with, the Hospital should know that all documents will be subject to public inspection and, indeed, reprinting in the newspapers. But the "legitimate expectation of privacy" should be looked at as of the time that the documents were generated. By all appearances at that time the Hospital was a private, non-profit corporation contracting with the County. G.S. 143-138.10 and 138-11, declaring such a hospital to be a "public body" subject to public disclosure, had not yet been enacted. A document generated at that time, particularly one that falls within the attorney-client privilege, we respectfully submit, is clearly made with a "legitimate expectation of privacy" within the meaning of this Court's decisions in *Griswold*, *Katz*, and *Nixon*.

We also submit that the issue presented is important enough to be decided. It needs no citation to recognize that state and local governments are growing in both relative size and relative importance. Public disclosure acts have also grown and are now quite the norm. These public disclosures acts come into conflict with reasonably anticipated federal rights of privacy of public officials, of persons who suddenly find themselves to be included in a broad sweep of public officials, and of those who deal with such officials. The *City of Carmel-by-the-Sea* and *Byron, Harless* cases from California and Florida earlier cited, *supra* p. 7, join this one as three examples of such conflicts.

It is important that the lines between legitimate public disclosure and legitimate privacy rights be clarified so that it is clearer when an expectation of privacy is legitimate under the Federal Constitution. We respectfully submit that this case, where the state of North Carolina (as construed by its courts)

legislated so as to permit public disclosure to a newspaper of what was reasonably expected to be private when made is an appropriate vehicle to begin this clarification.

CONCLUSION

For the foregoing reasons, we respectfully urge that this case be set down for plenary consideration by the Court. In the alternative, we urge that the Court reverse upon this Jurisdictional Statement and whatever opposing paper may be filed.

Respectfully submitted,

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June 1, 1982

APPENDIX

APPENDIX

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA

WAKE COUNTY

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,

Plaintiffs,

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS,

Defendants

JUDGMENT

Filed W.C.S. CT.
1981 Jan. 7: PM 12:25

THIS CAUSE coming on to be heard and being heard before the Honorable Thomas H. Lee, Judge Presiding at the Civil Session of the General Court of Justice, Superior Court Division, of Wake County, commencing on 24 November, 1980, the case having been regularly scheduled for hearing at that session, and being heard on 24 November 1980 on the plaintiffs' Motion for Summary Judgment, dated 3 October 1980, filed and served on the defendants on 6 October 1980 and the Court having considered the Motion for Summary Judgment and the pleadings, answers to interrogatories, and admissions on file, together with the affidavits and the certified copies of public records and documents listed in EXHIBIT A attached to and made a part of the plaintiffs' Motion for Summary Judgment and filed and served on the defendants on 6 October 1980, and the Court having considered the oral arguments of counsel for the parties and the memoranda of law and briefs filed by counsel for the respective parties, the Court

concludes that the pleadings, answers to interrogatories, and admissions on file, together with the affidavits and the plaintiffs' Exhibits, show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law granting their Motion for Summary Judgment;

And upon the uncontradicted facts, the Court concludes that the defendant Wake County Hospital System, Inc., is "an agency of North Carolina government or its subdivisions" as defined by G.S. § 132.1, specifically, that the said defendant is a public officer and an agency of Wake County, and that the records of the defendant Wake County Hospital Systems, Inc., are public records as defined by G.S. § 132-1, subject to inspection, examination and copying by any person, including the plaintiffs herein, except such records of the defendant Wake County Hospital System, Inc., as are specifically exempt by statute from the application of G.S. § 132-1 and G.S. § 132-6; and the Court further concludes upon the uncontrolled facts that the following records of the defendant Wake County Hospital Systems, Inc., are public records within the meaning of G.S. § 132-1, and are records which the defendants, after demand by the plaintiffs for inspection and copying, have refused to permit the plaintiffs to inspect and examine and to have copies:

(a) All minutes of every meeting and session of the Board of Directors of the defendant Wake County Hospital Systems, Inc., and of every Committee of the Board of Directors, at which there were deliberations or voting or other actions with respect to the settlement of the claims and litigation involved in civil actions in the General Court of Justice, Superior Court Division, Wake County, North Carolina, entitled as follows: (a) David Lane Jones, M.D., P.A., v. Wake County Hospital System, Inc. (78 CVS 6524); (b) Morton L. Meltzer, M.D., P.A., v. Wake County Hospital System, Inc. (78 CVS 6525); and (c) Cary Family Medicine and Ambulatory Care Center, P.A., v. Wake County Hospital System, Inc. (78 CVS 6526), EXCEPTING, HOWEVER, any portion of any such minutes which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1, which communication shall not be subject to public inspection until three years from the date such communication was received by the Board of Directors of the defendant Wake County Hospital System, Inc.

(b) Every written instrument or document in the form of a release or other written agreement signed by each of the claimants [the plaintiffs in the civil actions referred to in paragraph (a)] effectuating or otherwise evidencing the settlement of each of the claims and the litigation involving the claims, respectively.

(c) Every check or voucher issued and payable to each of the claimants referred to in paragraph (a) in payment of the amount agreed upon in settlement of each of the respective claims.

(d) Every record reflecting all of the expense accounts submitted by the defendant William F. Andrews and the members of the Board of Directors of the defendant Wake County Hospital System, Inc., over the past five years which were paid by the said defendant.

And it appears to the Court from the answers of the corporate defendant to plaintiffs' Interrogatory No. 1 that on December 27, 1979, the Board of Directors of Wake County Hospital System, Inc., by action of the said Board of Directors taken during an executive session, authorized the settlement of the claim of Morton Meltzer, M.D., P.A., and it appears that in paragraph 23 of the Answer the defendants made the following admissions: "It is admitted that the Board of Directors of the Wake County Hospital System, Inc. considered and approved the settlement of the claim of Morton Meltzer, M.D., P.A. authorizing the payment of monies to Morton Meltzer, M.D., P.A. and gave instructions to its attorney concerning the settlement and that the terms of the settlement have not been reported to the Minutes of the regular meetings of the Board of Directors." The Court concludes that the defendants, members of the Board of Directors of Wake County Hospital System, Inc., have failed to comply with the mandate of G.S. § 143-318.11(a)(4), last sentence, reading as follows (effective 1 October 1979): "If a public body has considered a settlement in executive session, the terms of that settlement shall be reported to the public body and entered into its minutes within a reasonable time after the settlement is concluded."

It appears to the Court that the defendants made the following further admission in paragraph 28 of the Answer: "It is admitted that from December 19, 1978, to December 31, 1979, the Board of Directors of the Wake County Hospital System, Inc., pursuant to its

established schedule of meetings, held regular meetings and executive sessions at which time its attorney reported on three (3) complaints above referred to, and authorized the settlement of such claims." G.S. § 143-318.11(d) provides as follows: "(d) Minutes of executive session. Nonwithstanding the provisions of G.S. 132-6, minutes and other records made of an executive session may be withheld from public inspection so long as public inspection would frustrate the purpose of the executive session." The Court concludes that there is no showing or evidence in the record that public inspection at the present time of minutes of executive sessions of the Board of Directors of Wake County Hospital System, Inc., held prior to December 31, 1979, at which the Board authorized settlement of the said three claims would frustrate the purpose of any such executive session.

The Court concludes as a matter of law that the plaintiffs are entitled to inspect, examine and have copies of the records hereinbefore specified, as provided by G.S. § 132-6, except as to written confidential communications of counsel for the corporate defendant as hereinbefore specified, and upon the undisputed and uncontradicted facts and the said conclusions of law, it appears to the Court that the plaintiffs are entitled to Summary Judgment against the defendants compelling the defendants to permit the plaintiffs to inspect, examine and have copies of the said records, and against the defendants who are members of the Board of Directors of the defendant Wake County Hospital System, Inc., directing and compelling them to report and enter into the minutes of the said Board the terms of the settlement of the claim of Morton Meltzer, M.D., P.A., which was authorized at the executive session held on December 27, 1979; and counsel for the parties hereto having executed and filed herein a written stipulation that the Court may sign and enter a judgment or order in this case out of the session and out of the District; now, therefore,

IT IS ORDERED AND ADJUDGED, as follows:

1. That the defendants, Marjorie B. Debnam, Curtis M. Thompson, Harvey L. Montague, J. T. Lindley, Odell C. Kimbrell, Jr., Rex C. Powell, M. Edmund Aycock and James Michael Weeks, the members of the Board of Directors of the defendant Wake County

Hospital System, Inc., be and they are hereby ordered, directed and commanded to comply with the provisions of G.S. § 143-318.11(a)(4), last sentence, by reporting and entering into the minutes of the said Board the terms of the settlement of the claim of Morton Meltzer, M.D., P.A., authorized by the said Board at an executive session held on December 27, 1979.

2. That the defendant Wake County Hospital System, Inc., and its officers and directors, defendants herein, including the defendant Marjorie B. Debnam, Secretary and custodian of the minutes and records of the Board of Directors of the defendant Wake County Hospital System, Inc., and the defendant Etta S. Creech, Secretary and custodian of the records of the defendant Wake County Hospital System, Inc., be and they are ordered, directed and commanded to permit the plaintiffs to inspect, examine and have copies of the specific records of the defendant Wake County Hospital System, Inc., hereinbefore described, in accordance with the provisions of G.S. § 132-6, specifically excepting, however, any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1, and excepting also any portion of any minutes of the Board of Directors of the defendant Wake County Hospital System, Inc., which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1; and it is ordered that any such communication shall not be subject to public inspection until three years from the date such communication was received the Board of Directors of the defendant Wake County Hospital System, Inc.

3. That the costs of this action be taxed against the defendants.

This 6th day of January 1981.

/s/ THOMAS H. LEE
Thomas H. Lee, Judge Presiding

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., M.D., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS, SR.

No. 8110SC274.

Court Of Appeals Of North Carolina.
Dec. 1, 1981.

HILL, Judge.

On May 25, 1955, the Wake County Board of Commissioners [hereinafter referred to as the Commissioners] followed the recommendation of a "hospital survey" ordered by them in 1954 and created the Wake County Hospital Authority [hereinafter referred to as the Authority]. One county commissioner and six other citizens were named to the board of trustees of the Authority. By resolution on 18 July 1955, the Commissioners vested in the Authority "duties and powers for the planning, establishment, construction, maintenance and operation of a county hospital. . . ." The Commissioners further resolved that they would have the power to remove any member of the Authority for misconduct "or for other causes which in the sound discretion of the board renders such member as unfit or disqualified to serve." Also, the county treasurer would have custody of "all funds of the hospital . . . and establish and maintain an accounting system in such manner as to give a true and accurate accounting of all the financial transactions of the hospital and clinics." The Authority, however, would retain control over the expenditures of moneys collected through the operation of its hospitals and clinics. In addition, the Authority would have the power to adopt its own by-laws and to select and hire all necessary employees and assistants. Signifi-

cantly, the resolution states that "[t]he Hospital shall be operated at all times, and in every respect administered as a charitable, non-profit hospital; no part of the net earnings of the Hospital shall ever inure to the benefit of any individual, firm, corporation or private shareholder." Further, title to all property for hospital purposes would be vested in the County, although the Authority could purchase necessary equipment. The Commissioners also placed certain fiscal limitations upon the Authority: (1) that the Commissioners review and approve the annual budget of the Authority; (2) that the Authority not borrow money, undertake additional programs, or other expenditures without the approval of the Commissioners; and (3) that a representative of the Commissioners be permitted to attend meetings, review the Authority's records, and make audits necessary in connection with indigent's records..

On 7 June 1965, the Commissioners unanimously approved a resolution adopted by the Authority "to convert Wake Memorial Hospital to a non profit corporation." Three months later the Commissioners officially approved the articles of incorporation of the System, a lease agreement between the county and the System, and an agreement between the county and the System for the care and treatment of indigent patients.

The System's articles of incorporation, filed 9 September 1965, provide, as did the Commissioner's resolutions creating the Authority, that "[t]he corporation shall not have and issue capital stock and shall be operated without profit to the members or their successors, and no part of the net earnings shall inure, or may lawfully inure, to the benefit of any member of individual." Further, in the event of dissolution of the corporation, "all of its moneys, properties, and other assets" would be donated, transferred and delivered to the county to be used by the county "exclusively for the accomplishments of the purposes for which the corporation is formed." The articles of incorporation also provide that all vacancies in the membership of the System's board of directors would be "subject to the approval of the Board of County Commissioners of Wake County. . . ."

The lease agreement entered into by the county and the System on 7 September 1965 provided for a renewable five-year term; the annual

rental was $1.00 per year during the term. The county also placed certain fiscal limitations upon the System very similar to limitations placed upon the Authority by the Commissioners: (1) that the Commissioners review and approve the annual budget of the System; (2) that the System make its records available to an independent auditor mutually satisfactory to the county and the System; (3) that a representative of the county be permitted to attend meetings, review the System's records, and make audits necessary in connection with indigents' records; (4) that the System file with the county a schedule of its charges and rates; and (5) that the System operate its facilities in accordance with standard practices for operating hospitals in North Carolina. The System was operated under this lease agreement until 1 January 1975.

On 1 January 1975, the System became subject to an operating agreement entered into by it and the county. Included in the agreement was a bond order authorizing the issuance of $34,775,000 in revenue bonds which were identified as "Bonds of the County." Pursuant to the bond order, the System agreed to collect revenues for deposit to the revenue fund which "constitute[s] revenues of the County derived from the ownership of the System by the County. . . ." The System further agreed to make its records available to the county and furnish it copies of audited financial statements and additional audits and reports as required by law. Upon the termination of this agreement, in accordance with the amended articles of incorporation, the System agreed to "transfer, assign and convey to the County, without any consideration therefor, and and all moneys, properties and other assets" of the System except as otherwise required by law. The System also agreed that it would not change its corporate existence, nor further amend its articles of incorporation, "without the prior written consent of the County." Finally, the System and the county "understood and agreed that the [System] is an independent contractor and that none of the Trustees, officers, employees or agents of the [System] is or shall be deemed to be an agent or employee of the County by reason of anything contained in this Agreement."

After two and one-half years of operation under the 1975 agreement, the county and the System entered into a new operating agree-

ment on 1 June 1977. Included in this agreement was another bond order of $41,535,000 adopted by the Commissioners to refund the 1975 revenue bonds. The significant provisions of this operating agreement and the 1975 agreement are substantially the same. At all times it has been the purpose of the System "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County through the continued assistance of contributions by the County."

On 19 December 1978, three separate civil actions were begun against the System by three medical professional associations — David Lane Jones, M.D., P.A.; Morton Meltzer, M.D., P.A.; and Cary Family Medicine and Ambulatory Care Center, P.A. — for alleged wrongful termination of agreements to provide professional services to the System by each plaintiff. Each of the civil actions subsequently was dismissed, and the controversies were concluded by settlements. The newspaper was refused permission by the System to examine and copy its records pertaining to those settlements, and the crux of the case *sub judice* is whether those records and the expense account records later requested by the newspaper, are public records which must be disclosed under North Carolina's public records statutes. *See* G.S. 132-1 to -9.

[1] This case is before us on appeal from the trial judge's granting of summary judgment for the newspaper. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey* v. *Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980); *Singleton* v. *Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972). "Accordingly, the party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court and his entitlement to judgment as a matter of law." *Vassey* v. *Burch*, *supra* at 72, 269 S.E.2d at 140.

At the outset of this opinion, we find the facts as recounted above to be uncontroverted. The trial judge therefore was correct in concluding that there is no genuine issue as to any material fact in the case *sub judice*. Our review of the newspaper's summary judgment must focus upon the propriety of the trial judge's conclusions of law and whether they are supported by the facts.

G.S. 132-1 identifies for us which of the trial judge's legal conclusions are crucial to our review:

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina goverment or its subdivisions*. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (Emphasis added.)

Under this statute, two questions must be answered: First, whether the trial judge was correct in concluding that the System is an "agency of North Carolina government or its subdivisions"; i.e., Wake County; and second, if the System is an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business. . . ."

[2] In deciding whether it is an agency of Wake County, the System urges us to consider, among other statutes, the Municipal Hospital Facilities Act, G.S. 131-126.18 to .30, and the Health Care Facilities Finance Act, F.S. 131A-1 to -25, *in pari materia* with the public records statutes. Those statutes show, the System argues, that the legislature did not intend it to be a "public agency or subdivision of the State."

It is established that "[u]nder the rules of statutory construction, statutes *in pari materia* must be read in context with each other." *Cedar Creek Enterprises, Inc.* v. *Department of Motor Vehicles*, 290

N.C. 450, 454, 226 S.E.2d 336, 338 (1976). *Accord, Newlin* v. *Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977). "*In pari materia*" is defined as "[u]pon the same matter or subject." Black's Dictionary 898 (4th ed. 1968). It is abundantly clear that the statutes referred to above are not of the "same matter or subject" as the public records statutes. We therefore are obliged only to construe the phrase "agency of North Carolina government or its subdivisions" upon the plain meaning of G.S. 132-1 and in the context of the public records statutes.

There is no decisional law in North Carolina construing the agency requirement of the public records statutes. However, decisional law in the federal jurisdiction has established some guidelines for the meaning of the term "agency" in the Administrative Procedure Act [hereinafter referred to as the APA]. Under the APA, an agency "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . . " 5 U.S.C.A. § 551. The North Carolina statute's definition of the phrase "agency of North Carolina government or its subdivisions" is more specific than the APA definition:

> Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of goverment of the State or of any county, unit, special district or other political subdivision of government.

G.S. 132-1. In spite of this difference in definitions, we find the federal decisional law under the APA instructive in this case.

Soucie v. *David*, 448 F.2d 1067 (D.C.Cir. 1971), is a leading case in construing the term "agency" in the APA for application to the Freedom of Information Act. The court declared that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* at 1073. Administrative entities that neither perform rule-making nor ajudicative duties also may be agencies. *Id. Accord, Koden* v. *Department of Justice*, 564 F.2d 228 (7th Cir. 1977). "The important consideration is whether [the administrative entity] has any authority in law to make decisions." *Washington Research Project, Inc.* v. *Department of Health, Education & Welfare*, 504 F.2d 238,

248 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975).

One commentator has suggested that the legislative history of the APA reflects "a desire to use the term 'agency' to identify centers of gravity lies, where substantial 'powers to act' with respect to individuals are vested, there is an administrative agency for purposes of the APA." J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U.Pa.L.Rev. 1, 9 (1970) [hereinafter referred to as Freedman].

The documents creating the System support our conclusion that it is a separate administrative entity which has the power to govern its daily functions with certain supervision and control by the county. Since the System clearly has "independent authority" in the function of its task "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County," the System falls within the guidelines of the federal jurisdiction defining "agency" in the APA. The critical determination is, however, whether this "independent authority" so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an "agency *of North Carolina government or its subdivisions;*" i.e., Wake County. We hold that it does not, and find that the System is an agency of the county under the North Carolina public records statutes.

[3] The System argues that its status as a "private, non-profit corporation" and "independent contractor" is exclusive of the status of agency under the public records statutes. However, several courts have found corporate entities to be agencies of local government for a variety of purposes. Most notably, in *Coats* v. *Sampson County Memorial Hospital, Inc.*, N.C. 332, 141 S.E.2d 490 (1965), our Supreme Court found a hospital organized as a non-stock, nonprofit corporation to be an agency of Sampson County for venue purposes. The hospital was governed by a board of trustees appointed by the Sampson County Board of Commissioners, it occupied premises owned and provided by the county under a lease, and in the event of dissolution, the hospital was obligated to transfer its assets to the county. *Id.* Justice Sharp, later Chief Justice wrote for the Court:

> Admittedly defendant is not a municipality in the sense of a political subdivision such as a city or a town or a quasi-

> municipality like a county. (Citation omitted.) G.S. 131-126.28 does, however, declare the establishment, construction, maintenance and operation of hospital facilities to be public and governmental functions; and, under the provisions of G.S. 131-126.20 and G.S. 131-126.21(a), Sampson County has delegated to defendant its authority to exercise these functions. Defendant is, therefore, an agency of Sampson County . . . .

Id. at 334, 141 S.E.2d at 492.

In *Sides* v. *Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 18, 213 S.E.2d 297, 300 (1975), a hospital was created by legislative act as a "body corporate." The Court noted that the act granted "the county the authority to levy a special tax to provide for the operation and maintenance of the hospital and to substantially control its operations through the county board of commissioners . . . ." *Id.* Based upon examination of the legislative acts of creation and relevant administrative rulings, the Court found the hospital to be an agency of Cabarrus County, maintained thereby as a "proprietary function," and therefore liable in tort for the negligent acts of its employees committed in the scope of their employment. *Id.*

Similarly, a board of trustees of a public library, organized as " 'a separate corporate entity' by the Act under which it came into being," was found to be an agency of the City of Newark, New Jersey, and thereby subject to laws affecting contracts with municipalities. *Glick* v. *Trustees of Free Public Library*, 2 N.J. 579, 582, 67 A.2d 463, 464 (1949). The court examined the relationship between the library and the municipality and concluded that "[the Trustees'] incorporation as a body politic . . . in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design." *Id.* at 583-84, 67 A.2d at 465.

In *Moberly* v. *Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975), a hospital with corporate status was found to be an agency of the City of Cumberland, Maryland, and thereby subject to that state's public information law. Among other things, "[a] survey of the enactments relative to the Hospital, including, specifically, the statements relative to the relationship of the Hospital to the City of Cumberland . . . leads to the conclusion that the Hospital is in fact an

agency of the City of Cumberland." *Id.* at 225, 375 A.2d at 862-63. Likewise, the District Court of Appeal of Florida found "a nonprofit corporation composed of public spirited citizens" to be an agency within the purview of that state's public records law. *Schwartzman* v. *Merritt Island Volunteer Fire Dept.*, 352 S.2d 1230, 1231 (Fla.App. 1977).

Although these cases illustrate that a corporate entity also may be considered an agency of local government, even for the purposes of state public records statutes, they are not entirely dispositive of the case *sub judice*. "The unavoidable fact is that each new arrangement must be examined anew and in its own context." *Washington Research Poject, Inc.* v. *Department of Health, Education & Welfare, supra* at 246. *See also Public Citizen Health Research Group* v. *Department of Health, Education & Welfare*, 449 F.Supp. 937 (D.C.1978). As did the courts in the above cases, we now must look at the nature of the relationship between the System and the county to determine that the System is an "agency of North Carolina government or its subdivisions."

Wake County's supervisory responsibilities and control over the System are manifest. The System's articles of incorporation provide (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners' approval. The lease agreement provided (3) that the System occupy premises owned by the county under a lease for $1.00 a year; (4) that the Commissioners review and approve the System's annual budget; (5) that the county conduct a supervisory audit of the System's books; and (6) that the System report its charges and rates to the county. The operating agreements also provide (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent.

The Municipal Hospital Facilities Act also sheds light upon the nature of the System's relationship to the county in congruence with the articles of incorporation, lease, and operating agreements which

we have reviewed. G.S. 131-126.28, for example, states that the operation of a county hospital is a "public and governmental" function, "exercised for a public purpose," and thereby a county function. *See Coats* v. *Sampson County Memorial Hospital, Inc., supra.*

We note that this relationship between the System and the county was not a radical change from the relationship between the Authority and the county. Most significantly, the entity created by resolution in 1955, "a charitable, non-profit hospital," remained as such under the System's articles of incorporation. The county further retained its ownership and fiscal controls upon the System in a manner virtually identical to those upon the Authority. In short, the relationship has undergone little more than a change of name through incorporation. "[T]he title of the authority in question, whether it be 'agency' or 'board' or 'bureau' or 'office' or 'department,' is irrelevant to assessing the power it exerts." Freedman, 119 U.Pa.L.Rev. at 9.

The System has conceded on oral argument that, as the Authority, it was an agency of Wake County. The history of the System's existence since its incorporation mandates the same concession. These ties to the county lead us to the inescapable conclusion that the System exercises its "independent authority" so intertwined with the county that it must be, and is, an "agency of North Carolina government or its subdivisions;" i.e., Wake County.

Since the System is an agency of Wake County under our public records statutes, we now must determine whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . . ." G.S. 132-1. The newspaper seeks inspection and examination of two types of records: first, records reflecting the terms of settlements reached in three actions against the System by medical professional associations; and second, expense account records submitted by the System's president and board of directors.

[4, 5] G.S. 143-318.11(a)(4) requires a "public body" to report its consideration of settlement terms in executive session by entering the terms "into its minutes within a reasonable time after the settlement is concluded." By virtue of the definitions in G.S. 143-318.10(b) and G.S. 159-39(a), we find that the System is a "public

body" that must, by law, record settlement terms considered in executive sessions. In addition, the public has the right to know the terms of settlements made by the System in actions for wrongful terminations of its agreements since the funds from which the settlements were paid must be considered the county's funds. *See Miami Herald Publishing Co.* v. *Collazo*, 329 S.2d 333 (fla. App.1976); *Courier Journal* v. *McDonald*, 524 S.W.2d 633 (Ky.App.1974). Therefore, we conclude that the documents connected with the settlement terms in the case *sub judice* are "public records" which were "made . . . pursuant to law . . . in connection with the transaction of public business . . . ."

[6] We reach the same conclusion regarding the expense accounts submitted by the System's president and board of directors. The phrase in G.S. 132.1, "pursuant to law or ordinance in connection with the transaction of public business," should include, in addition to those records required by law, those records that are kept in carrying out lawful duties. *See* Comment, *Administrative Law — Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C.L.Rev. 1187 (1977); J. Johnson & D. Lawrence, *Interpreting North Carolina's Public Records Law*, 10 Local Gov't.L.Bull. 1 (Inst. of Gov't., Chapel Hill, N.C., 1977). The statute therefore includes the expense account records submitted by the System's president and board of directors while carrying out their lawful duties. Those records, then, also are "public records" under G.S. 132-1.

We conclude that the trial judge's conclusions of law are supported by the facts as found. Thus, the summary judgment for the newspaper was not improvidently granted.

We have carefully examined the System's remaining arguments and assignments of error and find each to be without merit. For all of the reasons discussed above, the summary judgment for the newspaper is

Affirmed.

VAUGHN and WHICHARD, JJ., concur.

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT
Fall Term 1981

No. 8110SC274

NEWS & OBSERVER PUBLISHING COMPANY, *et al*

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al*

ORDER DENYING PETITION FOR DISCRETIONARY REVIEW

Upon consideration of the petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 3rd day of March 1982.

/s/ MITCHELL, J.
Mitchell, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of March 1982.

/s/ J. GREGORY WALLACE
J. Gregory Wallace
Clerk of the Supreme Court

IN THE COURT OF APPEALS OF THE STATE OF NORTH CAROLINA
TENTH DISTRICT

COURT OF APPEALS	SUPERIOR COURT
No. 811OSC274	**No. 80CvS1640**

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,
Appellees.

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS, SR.,
Appellants,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wake County Hospital System, Inc., et al., appeals to the Supreme Court of the United States from the December 1, 1981 judgment of the Court of Appeals of the State of North Carolina affirming the Superior Court's decision No. 80CvS1640. The Supreme Court of North Carolina, on March 5, 1982, denied a timely-filed petition to review the judgment of the North Carolina Court of Appeals.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

This the 27th day of April, 1982.

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UNITED STATES CONSTITUTION

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT III [1791].

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791].

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual sevice in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791].

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT IX [1791].

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for

President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection of rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NORTH CAROLINA GENERAL STATUTES

Chapter 132.
Public Records

§ 132-1. "Public records" defined.

"Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (1935, c. 265, s. 1; 1975, c. 787, s. 1.)

§ 132-1.1 Confidential communications by legal counsel to public board or agency; not public records.

Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three

years from the date such communication was received by such public board, council, commission or other governmental body. (1975, c. 662.)

§ 132-2. Custodian designated.

The public official in charge of an office having public records shall be the custodian thereof. (1935, c. 265, s. 2.)

§ 132-3. Destruction of records regulated.

No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with G.S. 121-5, without the consent of the Department of Cultural Resources. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00). (1935,, c. 265, s. 3; 1943, c. 237; 1953, c. 675, s. 17; 1957, c. 330, s. 2; 1973, c. 476, s. 48.)

§ 132-4. Disposition of records at end of official's term.

Whoever has the custody of any public records shall, at the expiration of his term of office, deliver to his successor, or, if there be none, to the Department of Cultural Resources, all records, books, writings, letters and documents kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for the space of 10 days after request made in writing by any citizen of the State to deliver as herein required such public records to the person authorized to receive them shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. (1935, c. 265, s. 4; 1943, c. 237; 1973, c. 476, s. 48; 1975, c.. 696, s. 1.)

§ 132-5. Demanding custody.

Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall

forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for 10 days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. (1935, c. 265, s. 5; 1975, c. 696, s. 2.)

§ 132-5.1. Regaining custody; civil remedies.

(a) The Secretary of the Department of Cultural Resources or his designated representative or any public official who is the custodian of public records which are in the possession of a person or agency not authorized by the custodian or by law to possess such public records may petition the superior court in the county in which the person holding such records resides or in which the materials in issue, or any part thereof, are located for the return of such public records. The court may order such public records to be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records. If the order of delivery does not receive compliance, the petitioner may request that the court enforce such order through its contempt power and procedures.

(b) At any time after the filing of the petition set out in subsection (a) or contemporaneous with such filing, the public official seeking the return of the public records may by ex parte petition request the judge or the court in which the action was filed to grant one of the following provisional remedies:

(1) An order directed at the sheriff commanding him to seize the materials which are the subject of the action and deliver the same to the court under the circumstances hereinafter set forth; or

(2) A preliminary injunction preventing the sale, removal, disposal or destruction of or damage to such public records pending a final judgment by the court.

(c) The judge or court aforesaid shall issue an order of seizure or grant a preliminary injunction upon receipt of an affidavit from the

petitioner which alleges that the materials at issue are public records and that unless one of said provisional remedies is granted, there is a danger that such materials shall be sold, secreted, removed out of the State or otherwise disposed of so as not to be forthcoming to answer the final judgment of the court respecting the same; or that such property may be destroyed or materially damaged or injured if not seized or if injunctive relieve is not granted.

(d) The aforementioned order of seizure or preliminary injunction shall issue without notice to the respondent and without the posting of any bond or other security by the petitioner. (1975, c. 787, s. 2.)

§ 132-6. Inspection and examination of records.

Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law. (1935, c. 265, s. 6.)

§ 132-7. Keeping records in safe places; copying or repairing; certified copies.

Insofar as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read. Whenever any State, county, or municipal records are in need of repair, restoration, or rebinding, the head of such State agency, department, board, or commission, the board of county commissioners of such county, or the governing body of such municipality may authorize that the records in need of repair, restoration, or rebinding be removed from the building or office in which such records are ordinarily kept, for the length of time required to repair, restore, or rebind them. Any public official who causes a record book to be copied shall attest it and shall certify on oath that it is an accurate copy of the original book. The copy shall then have the force of the original. (1935, c. 265, s. 7; 1951, c. 294.)

§ 132-8. Assistance by and to Department of Cultural Resources.

The Department of Cultural Resources shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, filing and making available the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Secretary of Cultural Resources, establishing a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the Department of Cultural Resources shall (subject to the availability of necessary space, staff, and other facilities for such purposes) make available space in its Records Center for the filing of semicurrent records so scheduled and in its archives for noncurent records of permanent value, and shall ender such other asistance as needed, including the microfilming of records so scheduled. (1935, c. 265, s. 8; 1943, c. 237; 1959, c. 68, s. 2; 1973, c. 476, s. 48.)

§ 132-8.1. Records management program administered by Department of Cultural Resources; establishment of standards, procedures, etc.; surveys.

A records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of official records shall be administered by the Department of Cultural Resources. It shall be the duty of that Department, in cooperation with and with the approval of the Department of Administration, to establish standards, procedures, and techniques for effective management of public records, to make continuing surveys of paper work operations, and to recommend improvements in current records management practices including the use of space, equipment, and supplies employed in creating, maintaining, and servicing records. It shall be the duty of the head of each State agency and the governing body of each county, municipality and other subdivision of government to cooperate with the Department of Cultural Resources in conducting surveys and to establish

and maintain an active, continuing program for the economical and efficient management of the records of said agency, county, municipality, or other subdivision of government. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-8.2. Selection and preservation of records considered essential; making or designation of preservation duplicates; force and effect of duplicates or copies thereof.

In cooperation with the head of each State agency and the governing body of each county, municipality, and other subdivision of government, the Department of Cultural Resources shall establish and maintain a program for the selection and preservation of public records considered essential to the operation of government and to the protection of the rights and interests of persons, and, within the limitations of funds available for the purpose, shall make or cause to be made preservation duplicates or designate as preservation duplicates existing copies of such essential public records. Preservation duplicates shall be durable, accurate, complete and clear, and such duplicates made by a photographic, photostatic, microfilm, micro card, miniature photographic, or other process which accurately reproduces and forms a durable medium for so reproducing the original shall have the same force and effect for all purposes as the original record whether the original record is in existence or not. A transcript, exemplification, or certified copy of such preservation duplicate shall be deemed for all purposes to be a transcript, exemplification, or certified copy of the original record. Such preservation duplicates shall be preserved in the place and manner of safekeeping prescribed by the Department of Cultural Resources. (1961, c. 1041; c. 476, s. 48.)

§ 132-9. Access to records.

Any person who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders. (1935, c. 265, s. 9; 1975, c. 787, s. 3.)

ARTICLE 33B.

Meetings Of Governmental Bodies.

§ 143-318.1. Public policy. — Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the peoples' business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly. (1971, c. 638, s. 1.)

§ 143-318.2. All official meetings open to the public. — All official meetings of the governing and governmental bodies of this State and its political subdivisions, including all State, county, city and municipal commissions, committees, boards, authorities, and councils and any subdivision, subcommittee, or other subsidiary or component part thereof which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest shall be open to the public. And every meeting, assembly, or gathering together at any time or place of a majority of the members of such governing or governmental body for the purpose of conducting hearings, participating in deliberations or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of said body shall constitute an official meeting, but any social meeting or other informal assembly or gathering together of the members of any such body shall not constitute an official meeting unless called or held to evade the spirit and purposes of this Article. (1971, c. 638, s. 1.)

ARTICLE 33C.

Meetings Of Public Bodies.

§ 143-318.9. Public policy. — Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly. (1979, c. 655, s. 1.)

§ 143-318.10. All official meetings of public bodies open to the public. — (a) Except as provided in G.S. 143-318.11, G.S. 143-318.15, and G.S. 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members; and

(1) Exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function; and

(2) Is established by (i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an executive order of the Governor or comparable formal action of the head of a principal State office or department, as defined in G.S. 143A-11 and G.S. 143B-6, or of a division thereof.

In addition, "public body" means (1) the governing board of a "public hospital" as defined in G.S. 159-39 and (2) each committee of a public body, except a committee of the governing board of a public hospital if the committee is not a policy-making body.

(c) "Public body" does not include and shall not be construed to include (1) meetings among the professional staff of a public body, unless the staff members have been appointed to and are meeting as an authority, board, commission, committee, council, or other body established by one of the methods listed in subsection (b)(2) of this section, or (2) meetings among the medical staff of a public hospital.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the

members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article. (1979), c. 655, s. 1.)

§ 143-318.11. Executive sessions. — (a) Permitted purposes. A public body may hold an executive session and exclude the public:

(1) To consider the selection of a site or the acquisition by any means or lease as lessee of interests in real property. At the conclusion of all negotiations with regard to the acquisition or lease of real property, if final authorization to acquire or lease is to be given, it shall be given at any open meeting.

(2) To consider and authorize the acquisition by gift or bequest of personal property offered to the public or the governent of which it is a part.

(3) To consider and authorize the acquisition by any means of paintings, sculptures, objects of virtu, artifacts, manuscripts, books and papers, and similar articles and objects that are or will be part of the collections of a museum, library, or archive.

(4) To consider the validity, settlement, or other disposition of a claim against or on behalf of the public body or an officer or employee of the public body or in which the public body finds that it has a substantial interest; or the commencement, prosecution, defense, settlement, or litigation of a potential or pending judicial action or administrative proceeding in which the public body or an officer or employee of the public body is a party or in which the public body finds that it has a substantial interest. During such an executive session, the public body may give instructions of a claim, judicial action, or administrative proceeding. If a public body has considered a settlement in executive session, the terms of that settlement shall be reported to the public body and entered into its minutes within a reasonable time after the settlement is concluded.

(5) To consult with an attorney to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(6) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body.

(7) To consider matters dealing with specific patients (including but not limited to all aspects of admission, treatment, and discharge; all medical records, reports, and summaries; and all charges, accounts, and credit information pertaining to such a patient).

(8) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of a public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge of grievance by or against a public officer or employee. A public body may consider the appointment or removal of a member of another body in executive session but may not consider or fill a vacancy among its own membership except in an open meeting.

. . . .

Part 4. Public Hospitals.

§ 159-39. Special regulations pertaining to public hospitals. — (a) for the purposes of this Part, "public hospital" means any hospital that

(1) Is operated by a county, city, hospital district, or hospital authority, or

(2) Is owned by a county, city, hospital district or hospital authority and operated by a nonprofit corporation or association, a majority of whose board of directors or trustees are appointed by the governing body of a county, city, hospital district, or hospital authority, or

(3) On whose behalf a county or city has issued and has outstanding general obligation or revenue bonds, or to which a county or city makes current appropriations (other than appropriations for the cost of medical care to prisoners or indigents).

. . . .

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No. 81-2213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*,
Appellants,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*,
Appellees.

On Appeal From The Court Of Appeals
Of The State Of North Carolina

MOTION TO DISMISS

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MOTION TO DISMISS

QUESTIONS PRESENTED

The question asserted by the Appellants for review by this Court was not timely or properly raised in the North Carolina courts and is not properly before this Court.

On this Motion to Dismiss, the Questions Presented are:

1. Does this Court have jurisdiction of this appeal under 28 U.S. Code §1257(2) when the validity of a statute of any state has not been drawn in question at any stage of the proceedings in the North Carolina courts on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and when there has been no decision in favor of the validity of any such statute on any ground, constitutional or otherwise?

2. Was the "federal question" sought to be reviewed on this appeal timely, explicitly and properly raised in the courts of North Carolina in accordance with the rules of North Carolina practice?

3. Have the Appellants presented a substantial federal question?

4. Does the judgment of the Superior Court of Wake County, North Carolina, unanimously affirmed by the North Carolina Court of Appeals (Discretionary Review denied by the Supreme Court of North Carolina) rest upon adequate and independent State grounds?

5. Have the Appellants properly complied with Rule 15.1, particularly subparagraphs (g) and (h)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2213

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*,
Appellants,

v.

*NEWS & OBSERVER PUBLISHING COMPANY, *et al.*,
Appellees.

On Appeal From The Court Of Appeals Of The State Of North Carolina

---

MOTION TO DISMISS: OBJECT AND GROUNDS

Pursuant to Rule 16, the Appellees file this Motion to Dismiss, its object being to have the Court dismiss the appeal for the reasons and upon the grounds and facts set forth as follows:

1. The appeal is not within this Court's jurisdiction as prescribed by 28 U.S. Code §1257 (2), because at no stage in the proceedings in the North Carolina courts has there been drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and there has been no decision in favor of the validity of any such statute.

---

* Corporate Appellee's only affiliate or subsidiary (except wholly owned subsidiaries) is Benson Newspaper Printing, Inc.

2. The "federal question" sought to be reviewed on this appeal was not timely, explicitly or properly raised in the courts of North Carolina in accordance with the rules of North Carolina practice and procedure. No North Carolina court has expressly or otherwise passed upon any federal question.

3. The appeal does not present any substantial federal question requiring consideration by this Court.

4. The judgment of the Superior Court, affirmed by the North Carolina Court of Appeals (Discretionary Review denied by the Supreme Court of North Carolina), rests upon adequate and independent State grounds—a nonfederal basis, and no constitutional or other federal question is in any way involved.

5. The Appellants have not met the burden imposed upon them by Rule 15 and have not complied with Rule 15.1(g)(h).

6. There is no valid reason, in law or fact, to support this appeal. The appeal is frivolous and is "an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted."

STATEMENT OF THE CASE

Because of certain inaccurate and misleading statements and material omissions and deficiencies in the Statement of the Case by the Appellants, this Statement is considered essential.

The Appellees agree with the Appellants (Jurisdictional Statement—hereinafter, J.S.—p. 3) that "the facts ... have been found by the courts below and are not in controversy." Therefore, for the undisputed facts the Court is referred to the Judgment (J.S., Appendix, 1a-5a) and the opinion of the North Carolina Court of Appeals (6a-9a).

(NOTE: References in this Motion to Dismiss to "R" are to the Record in the North Carolina Court of Appeals, being certified to the U.S. Supreme Court. Statement of Case references, "1a", "2a", etc., are to J.S. Appendix)

The Appellants do not challenge on this appeal the decisions of the North Carolina courts that the System is "an agency of North Carolina government." (J.S., p. 8, footnote 3) Also, the Appellants do not challenge in this Court the decisions of the State courts that records generally of the System are public records within the meaning of General Statutes §132-1. They refer to the expense account records that were ordered disclosed (J.S., p. 4), but they make no contention that those records are not public records accessible to the Appellees. The single question posed for decision here does not include those records (J.S., p. i).

The Appellants incorrectly asserted (J.S., p. 4) that the plaintiffs (Appellees) claimed a right "to inspect and to obtain copies of all records of the Hospital" pertaining to the settlement of the claims of three medical professional associations that had been based on alleged wrongful termination of agreements to provide professional services, "including communications from counsel and ... including advice of counsel concerning these cases and proposals of settlement." The Appellees have never sought to inspect or have copies of "communications from counsel" of the System or "advice of counsel concerning these cases and proposals of setttlement." That is demonstrated by the statement in the Complaint as to the records sought to be examined (Para. 33, R 10-11, Para. 38, R 13).

Furthermore, the Judgment (2a) describes the records sought to be examined and which the Court (later) ordered to be made accessible for examination. Written confidential communications of counsel as defined by G. S. §132-1.1 were expressly excepted. The last paragraph of the Judgment (5a) provides that the Appellants are ordered to permit the plaintiffs (Appellees) to "examine and have copies of the specific records of the defendant Wake County Hospital System, Inc., hereinbefore described in accordance with the provisions of G. S. §132-6, specifically excepting, however, any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. §132-1.1, and excepting also any portion of any minutes of the Board of Directors of the defendant Wake County Hospital System, Inc.,

which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. §132-1.1; and it is ordered that any such communication shall not be subject to public inspection until three years from the date such communication was received by the Board of Directors of the defendant Wake County Hospital System, Inc." (R 31)

The Appellants did not make any exception or assignment of error to the Judgment with respect to records of communications of counsel except in Assignment of Error No. 15 (R 37). That assignment of error merely asserted that "the Court failed and refused to decide ... what was and what was not a communication by legal counsel ..." That did not raise any federal question or constitutional issue involving records of written communications of counsel.

In asserting what the Public Records Statute, G.S. §132-1.1, provides with respect to records containing written communications of legal counsel, Appellants (J.S., p 5) inaccurately state: "... The Public Records Act specifically provides for public access to 'written communications ... made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action ...'" That statement of the provisions of G.S. §132-1.1 tends to be misleading, even though the Appellants added the clause: "except that such communications are subject to a three-year hiatus before becoming public records. G.S. §132-1.1" As worded, G.S. §132-1.1 is an affirmative exemption of written communications of counsel to any public board from "public records" as defined by G.S. §132-1.

Furthermore, the only reference in the proceedings to any communication of counsel appears in paragraph 28 of the Answer to the Complaint (R 17) as follows: "... at which time its [the System's] attorney reported on the three (3) complaints above referred to ..." It is not stated there or in any affidavit or other evidence that any "written communication" has ever been made by counsel of the System to the System or its Board.

In Appellants' Statement of the Case (J.S., p. 5), they assert that in opposition to the plaintiffs' (Appellees') Motion for Summary Judgment, the defendants (Appellants) "argued, *inter alia,* that the defendants in the action and the persons dealing with the Hospital had a right of privacy in the confidential communications protected under the Federal Constitution and that the North Carolina statute construed to violate that right would render the statute invalid as repugnant to the United States Constitution. . ." THAT STATEMENT IS ABSOLUTELY INACCURATE. The Appellants DID NOT ARGUE any such contention during the Superior Court proceedings. There is nothing in the record of those proceedings showing that the defendants (Appellants) pleaded in their Answer or asserted in any document filed by them in the Superior Court that any federal constitutional question was involved in any way in this action or that the defendants or any persons dealing with the System had "any right of privacy in the confidential communications protected under the Federal Constitution" or that "the North Carolina statute construed to violate that right would render the statute invalid as repugnant to the United States Constitution." (R 2-32) The Appellants cannot and do not cite any written evidence that a federal constitutional question was raised in the trial court. Argument —without a plea or other written document—is not an acceptable method of raising a federal question. It is repeated that Appellants DID NOT ARGUE in the Superior Court any such constitutional contention.

Even if the question had been "argued" (which is again denied), that would not be sufficient under North Carolina practice to raise a constitutional issue. "Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto" or may be made by motion. N.C. Rules of Civil Procedure, Rule 12(b). Affirmative defenses must be specially pleaded. *Id.*, Rule 8(c). That was not done by the Appellants.

The Appellants' Statement of the Case (J.S., p. 6) asserts that the defendants filed a timely appeal to the North Carolina Court of Appeals, "arguing" that the Superior Court judgment "violated 'the reasonable expectations of privacy' of both the

Hospital and the earlier litigants against the Hospital and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution." It is then asserted that the Court of Appeals "affirmed the judgment of the trial court, rejecting the constitutional arguments. . ." (J. S., p. 6) It should be observed that Appellants use the word *arguing*. They do not state and they could not truthfully state that their Assignments of Error filed in the North Carolina Court of Appeals included any assignment of error that asserts that the Superior Court Judgment "violated the reasonable expectations of privacy" of the System or of the "earlier litigants." Nor is there an assignment of error that any North Carolina Statute as construed and applied by the Superior Court "violates the right of privacy under the United States Constitution." (See Assignments of Error, R 34-38.)

The Court's attention is accordingly invited to the fact that the Appellants' Statement of the Case does not sufficiently meet the requirements of Rule 15.1(g). They do not show that any federal constitutional question was properly raised in either the Superior Court or in the Court of Appeals. They assert only that constitutional questions were "argued" in both courts, without any written evidence in the record to substantiate those contentions. Appellants do not even contend in the Jurisdictional Statement that any *specific* provisions of the U.S. Constitution were mentioned in any of the arguments.

This case involves only questions of State law—statutory construction—not any constitutional or other federal question. The Appellants conceded this in their brief filed in the North Carolina Court of Appeals (page 15) where they asserted that "the right to disclosure of public records is *statutory, and not constitutional;* the standards of this case called for an adjudication of whether the Defendants were persons within the meaning of the 1935 provisions or the 1975 amendments to the Public Records Law, . . . " (Emphasis added)

Referring to G.S. §132-1, the North Carolina Court of Appeals stated the principal questions of law before the Court as follows (55 N.C. App. at p. 7, 284 S.E.2d at p. 546-10a):

> Under this statute, two questions must be answered: First, whether the trial judge was correct in concluding that the System is an "agency of North Carolina government or its subdivisions"; i.e., Wake County; and second, if the System is an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . . "

The Court of Appeals answered those questions in favor of the Appellees (15a, 16a). Had there been a federal constitutional question, certainly the Court of Appeals would have so stated.

ARGUMENT

I. This Appeal Is Not Within This Court's Jurisdiction Because The Validity Of A State Statute Has Not Been Drawn In Question As Repugnant To United States Constitution, Treaty Or Law In Accordance With State Practice Rules.

The appeal is not within the jurisdiction of this court because it is not taken in conformity with 28 U.S. Code, §1257 (2) which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Nowhere in any of the proceedings in the North Carolina courts was the validity of any state statute drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or on any other ground. There has

been no pleading, motion or other written document constituting a part of the record of proceedings in the North Carolina courts that any North Carolina statute involved in this litigation is invalid on federal constitutional grounds or any other grounds (R 2-27).

The Supreme Court will not decide federal constitutional issues raised before it for the first time on review of state court decisions. *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969); *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981), and cases cited.

In the Jurisdictional Statement, ONLY ONE federal constitutional question is sought to be reviewed in this Appeal. That question involves a CONTENTION that the North Carolina Public Records Law and Open Meetings Law (G.S. §132-1, §143-318.10 and §143-318.11) are invalid because they violate "a privacy right protected by the Constitution of the United States" by forcing public disclosure of records of the Appellant Wake County Hospital System, Inc. ("System")—"specifically documents generated and discussions occurring in the course of litigation, covered at least in part by the attorney-client privilege, when ... there was a reasonable expectation that these documents would remain private." (J.S. p. i)

The Appellants in the Jurisdictional Statement point to no pleading, motion or other document filed by them in which the constitutional validity of any North Carolina statute was challenged. The Appellants did not include in their Assignments of Error filed in the North Carolina Court of Appeals any assertion of error based on the validity of any North Carolina statute on any federal constitutional ground (R 34-38).

Instead, Appellants in the Jurisdictional Statement contend only that this constitutional question was "argued" in the Superior Court and in the North Carolina Court of Appeals. They do not support their assertions by any citation to any part of the record of the proceedings.

The Supreme Court has held that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *F. G. Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897).

In *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, 68 L.Ed.2d 392 (1981), Mr. Justice White makes it clear that

> ... At a minimum, however, there should be no doubt *from the record* that a claim under a *federal* statute or the *Federal* Consitution was presented in the State courts and that those courts were apprised of the nature and substance of the federal claim at the time and in the manner required by the state law.... (Emphasis added)

It is thus well established that the Supreme Court looks to the record of the proceedings in the State court to determine whether a federal question has been timely and properly presented for decision by the State Court. Contentions by Appellants that constitutional questions were "argued" in the State courts, unsupported by the record, are not sufficient.

The only basis of a contention that the "privacy rights" of the Medical Professional Associations were violated by the Superior Court Judgment is the agreement made by the Appellant System with the Proessional Associations that "the terms of the settlement of each claim would be kept confidential and would not be publicly revealed." It should be noted that the plaintiffs (Appellees) alleged that agreement and then alleged that the agreement "was and is in violation of G.S. §143-318.*13*(a)(4) [later codified: G.S. §143-318.*11*(a)(4)] and Chapter 132 of the General Statutes, and, therefore, is null and void and of no legal effect." The defendants (Appellants) admitted the agreement but denied the legal conclusions (Complaint, para. 30, 31, R 9-10; Answer, para. 30, 31, R 17). THERE IS NO FURTHER REFERENCE TO THAT AGREEMENT IN ANY PLEADING OR ANY OTHER DOCUMENT FILED IN THE SUPERIOR COURT (R 2-27).

There is no reference to that agreement in the Assignments of Error (R 34-38).

If the Appellants desired to raise a federal constitutional question with respect to the validity of the agreement not to disclose to the public the records reflecting the terms of the claim settlements (its invalidity having been specifically alleged by the Appellees), the Appellants were required by North Carolina rules of practice and procedure to raise such question by the pleading of an affirmative defense or by a motion. N.C. Rules of Civil Procedure, Rules 8(c) and 12(b) [Appendix to Motion to Dismiss, p. 5a]

The Appellants list in the Jurisdictional Statement (p. 2) the following United States Constitutional provisions: "Article VI and the First, Third, Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution" and those constitutional provisions are set forth in the Appendix to the Jurisdictional Statement (19a-21a).

It should be observed that NO FURTHER REFERENCE is made in the Jurisdictional Statement to any of those constitutional provisions listed (J.S. p. 2) and set forth (Appendix, 19a—21a) EXCEPT the following reference to the Fourteenth Amendment (J.S., p. 6): "... the right of privacy is within the Fourteenth Amendment's concept of personal liberty..."

More significant and important, none of those listed federal constitutional provisions has been stated or cited in any pleading, motion or other document filed by the Appellants in the Superior Court proceedings. None has been stated or cited in the Assignments of Error (R 34-38) except a reference to the Fourteenth Amendment in Assignment No. 1 objecting to the failure to join necessary parties (R 34) which is not an issue or question before the Supreme Court. None of these constitutional provisions was cited or even referred to in the Appellants' Petition for Discretionary Review filed in the North Carolina Supreme Court. (Motion to Dismiss, p. 7a)

The Supreme Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Webb v. Webb*, 451 U.S. 493, 499, 101 S.Ct. 1889, 1893, 68 L.Ed. 2d 392 (1981), and cases

cited. Furthermore, *Webb* makes it clear the record as a whole must show clearly and explicitly that a *particular* federal constitutional provision was presented in the State courts.

In the Jurisdictional Statement the Appellants have not complied with Rule 15.1(g) and shown that the validity of a state statute was timely, explicity and properly drawn in question in any of the North Carolina courts on the ground of its being repugnant to the Constitution, treaties or laws of the United States. They have not shown that there has been a decision by any of the North Carolina courts in favor of the validity of any state statute on any such ground, simply because no issue as to the validity of any statute was timely or properly raised. Therefore, this Court does not have jurisdiction on this appeal, and the appeal should be dismissed. 28 U.S. Code § 1257 (2); Rule 15; *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 185, 65 S.Ct. 624, 627, 89 L.Ed. 857 (1945); *Chicago, Indianapolis, & Louisville Railway Company v. McGuire*, 196 U.S. 128, 25 S.Ct. 200, 49 L.Ed. 413 (1905); *Mutual Life Insurance Company v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1903); *Webb v. Webb, supra.*

II. The Appellants Failed To Raise Any Federal Question In The Trial Court As Required By North Carolina Rules Of Practice As Prerequisite For Consideration Of Any Such Question By North Carolina Appellate Courts.

The only power or jurisdiction of the United States Supreme Court over State court judgments is "to correct them to the extent that they adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945).

For the Supreme Court to have jurisdiction to review a decision of the highest court of a State, it must be shown by the party seeking the review that the asserted federal constitutional question was timely, explicitly and properly raised, preserved or passed upon in the State courts. *Webb v. Webb*, 451 U.S. 493, 498-499, 101 S.Ct. 1889, 1893, 68 L.Ed. 2d 392 (1981).

Federal constitutional questions not raised timely and properly in the State courts in accordance with State court practice will not be considered and decided by the United

States Supreme Court. *Wolfe v. North Carolina,* 364 U.S. 177, 195-196, 80 S.Ct. 1482, 1492-1493, 4 L.Ed. 2d 1650 (1960); *Pennsylvania Railroad Company v. Illinois Brick Company,* 297 U.S. 447, 462-463, 56 S.Ct. 556, 561, 80 L.Ed. 796 (1936).

"*The proper time* [for raising a federal question] is in the trial court whenever that is required by the state practice, . . . (Citations omitted; emphasis added) *Mutual Life Insurance Company v. McGrew,* 188 U.S. 291, 308, 23 S.Ct. 375, 378, 47 L.Ed. 480 (1904).

"*The proper way* [to raise a federal question] is by pleading, motion, exception or other action, part, or being made part, of the record, showing that the claim was presented to the court. (Citation omitted) It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. (Citations omitted) The assertion of the right must be made unmistakably, and not left to mere inference." (Citations omitted; emphasis added) *McGrew,* 188 U.S. at p. 308, 23 S.Ct. at p. 378, 47 L.Ed. 480 (1904).

North Carolina Practice Rule

It is a well-established rule of North Carolina practice and procedure that an appellate court of the State "will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." State ex rel. *Commissioner of Insurance v. North Carolina Rate Bureau,* 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980) and cases cited; *State v. Cumber,* 280 N.C. 127, 185 S.E.2d 141 (1971).

In *Cumber,* a constitutional question was not raised in the trial court; it was sought to be raised for the first time in the North Carolina Court of Appeals. The Supreme Court of North Carolina in that case dismissed the appeal, holding that the constitutional question was not properly before the Court of

Appeals nor before the North Carolina Supreme Court. Huskins, J., in the opinion of the North Carolina Supreme Court, wrote as follows (280 N.C. at pp. 131-132, 185 S.E.2d at p. 144):

> ... That belated constitutional question was injected for the first time on appeal to the Court of Appeals and therefore came too late. It was not properly before that court and is not now properly before us. "The attempt to smuggle in new questions is not approved. *Irvine v. California,* 347 U.S. 128, 129, [74 S.Ct. 381, 98 L.Ed. 561]. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E.2d 129. This is in accord with the decision of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358 [73 S.Ct. 293, 294, 97 L.Ed. 387]."....

The Appellants did not raise any federal question, constitutional or otherwise, in the trial court. The Appellants filed only two documents in the Superior Court: Answer to the Complaint (R 14-19) and Answers to Plaintiffs' Interrogatories (R 24-26). They did not plead in their Answer any constitutional provision (Federal or State) or any federal question.

The only federal question sought to be reviewed in this appeal is whether the North Carolina Public Records Statute (G.S. §132-1) constitutes a violation of a claimed privacy right to prevent public access to records of claim settlements made by agreements between the Appellant Wake County Hospital System, Inc., and three medical professional associations in which it had been agreed that the settlement terms would not be publicly disclosed. The Appellants did not plead any defense to the allegations in the Complaint (R 10) that the agreement not to disclose the settlement terms publicly was null and void because contrary to the requirements of the Public Records Statute. Appellants did not plead any of the federal constitutional provisions listed in the Jurisdictional Statement, nor Article I, Section 10 of the United States Constitution

(prohibition against any State law "impairing the Obligations of Contract"), nor any other provision of the United States Constitution.

In response to the Plaintiffs-Appellees' Motion for Summary Judgment, the Defendants-Appellants did not file any counter affidavit or any other evidence or document. (See Judgment, first paragraph (R 27-28), statement of documents before court.)

The feeble assertion by Appellants in the Jurisdictional Statement that the constitutional question was "argued" in the Superior Court—unsupported by any documentary evidence in the record—is not sufficient to raise a federal constitutional question.

A reading of the Judgment of the Superior Court (R 27-31) will reveal conclusively that no federal constitutional question was considered or passed upon by the Superior Court. When there is a failure of a court to pass upon a federal question, there is a presumption that the omission was due to a want of proper presentation. See *Webb v. Webb*, 451 U.S. 493, 495-496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981) and cases cited. The Appellants have not met their burden of rebutting the presumption.

III. In Their Assignments or Error Filed In The North Carolina Court of Appeals, The Appellants Failed to Assert The Federal Constitutional Question Sought To Be Reviewed On This Appeal Or Any Other Explicitly and Properly Raised Federal Question.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts," unless the aggrieved party in the United States Supreme Court "can affirmatively show the contrary." *Webo v. Webb*, 451 U.S. 493, 495-496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981); *Fuller v. Oregon*, 417 U.S. 40, 50, footnote 11, 94 S.Ct. 2116, 2123, 40 L.Ed.2d 642 (1974); *Bailey v. Anderson*, 326 U.S. 203, 206-207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

Nowhere in the opinion of the North Carolina Court of Appeals "is any federal question mentioned, let alone expressly passed upon." *Webb*, 451 U.S. at 495, 101 S.Ct. at 1891, 68 L.Ed.2d 392 (1981).

The ONLY claimed question on this appeal is whether the North Carolina Public Records Law and Open Meetings Law constitute a violation of a right of privacy protected under the U.S. Constitution by requiring public access to the records of the Appellant Hospital System containing the terms of settlement of the claims of three medical professional associations (J.S., p. i).

The North Carolina Court of Appeals could not and did not consider or pass upon any such question because none was raised or passed upon in the Superior Court, as shown in Section II hereof.

The scope of review on appeal to the Court of Appeals, under North Carolina Rules of Appellate Procedure, "is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." Rule 10(a). "Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required..." Rule 10(b). "The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions..." Rule 10(c). [Motion to Dismiss, 3a-5a]

In the Jurisdictional Statement the Appellants DO NOT CITE OR OTHERWISE ALLUDE TO any Assignment of Error filed by them in the Court of Appeals. Thus, they have not even sought to show that there was an assignment of error that presented to the North Carolina Court of Appeals the claimed federal constitutional question sought to be reviewed by the Supreme Court. They merely make the following

statement in a futile effort to suggest that the claimed constitutional question was raised in the Court of Appeals (J.S., p. 6):

> The Hospital and the other defendants filed a timely appeal to the North Carolina Court of Appeals, ARGUING, *inter alia,* that the order of the trial court violated "the reasonable expectations of privacy" of both the Hospital and the earlier litigants against the Hospital (Appellants' Brief to the N.C. Ct. of App., pp. 36-37) and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution (e.g. *id.* at 33) . . . (Emphasis added.)

An *argument* in a brief is no substitute for asserting grounds for review in Assignments of Error. Thus, the North Carolina Supreme Court has held that a contention in a brief that is not based on any exception and assignment of error will not be considered on appeal. *Lewis v. Parker,* 268 N.C. 436, 437, 150 S.E.2d 729, 730 (1966); *Glace v. Pilot Throwing Co.,* 239 N.C. 668, 671, 80 S.E.2d 759, 761 (1954), where the Court said: "Defendants in their brief contend . . . The defendants have precluded us from considering this contention by failing to present it by exception and assignment of error. . ."

THE OBVIOUS REASON THAT THE APPELLANTS MAKE NO REFERENCE IN THE JURISDICTIONAL STATEMENT TO THE ASSIGNMENTS OF ERROR FILED IN THE COURT OF APPEALS IS THAT THERE IS NO ASSIGNMENT OF ERROR THAT RAISED THE QUESTION SOUGHT TO BE REVIEWED BY THE SUPREME COURT (See Assignments, R 34-38.)

The Appellants filed 16 assignments of error in the North Carolina Court of Appeals. Although "exceptions" are referred to in the Assignments of Error, it will be observed that there are NO EXCEPTIONS in the record prior to and except as they are included in the Assignments of Error.

Except in Assignment of Error No. 1 (R 34), there is no reference in any of the Assignments of Error to a *specific provision* of the United States Constitution. That assignment asserted that the Superior Court Judgment was void for failure

to join necessary parties "contrary to . . . the Fourteenth Amendment of the United States Constitution guaranteeing to each person whose rights are adjudicated due process of law, . . ." That question has not been raised in this appeal. In any event, there had been no objection to the absence of necessary parties during the trial court proceedings, and, therefore, the question was not timely and properly raised on appeal. *State v. Cumber,* 280 N.C. 127, 131-132, 185 S.E.2d 141, 144 (1971).

In 10 of the 16 Assignments of Error, there is no reference either specifically or generally to the Federal Constitution (Assignments numbered 2, 3, 6, 8, 9, 10, 12, 14, 15, and 16).

In four of the Assignments of Error there are general, vague and non-explicit references as follows: (a) No. 4 (R 34): "in potential conflict with Constitutional rights"; (b) No. 5 (R 35): "in potential conflict with Constitutional right of patients, employees, business associates, and all persons entitled to privacy concerning private records"; (c) No. 11 (R 36): "unconstitutional on the grounds . . . "; (d) No. 13 (R 37): "unconstitutionally."

In Assignment of Error No. 7 (R 35), there is no reference to any constitutional provision, but it is asserted in that assignment that the Court was without jurisdiction to adjudicate privacy rights of non parties because of lack of "procedural due process of law and joinder of necessary parties in interest."

Thus, aside from a failure to raise any federal question TIMELY in the Superior Court as required by the rules of practice, *State v. Cumber,* 280 N.C. 127, 131-132, 185 S.E.2d 141, 144, the Appellants in the five Assignments of Error summarized above failed to raise a federal question WITH THE SPECIFICITY REQUIRED BY THE UNITED STATES SUPREME COURT. *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981); *Herndon v. Georgia,* 295 U.S. 441, 443, 55 S.Ct. 794-795, 79 L.Ed. 1530 (1935).

It follows that since the question sought to be reviewed here was not raised in the Assignments of Error filed in the Court of Appeals and was not mentioned or expressly passed upon in the opinion of the Court of Appeals, that question will not be reviewed by the United States Supreme Court.

IV. Even If Appellants Had Timely And Properly Raised Any Federal Constitutional Question For Decision By The North Carolina Court Of Appeals (Denied By Appellees), Appellants Did Not Preserve Or Present Any Federal Constitutional Question In Their Petition To The North Carolina Supreme Court For Discretionary Review Of The Court Of Appeals Decision.

The Jurisdictional Statement fails to mention any contention or assertion of error made by the Appellants in their Petition for Discretionary Review filed in the North Carolina Supreme Court. It is significant that in that Petition there is no claim that there was any federal constitutional question for decision or that the North Carolina Court of Appeals had passed upon any federal question requiring review by the North Carolina Supreme Court. In fact, the words "constitution," "constitutional," "constitutionality" or "federal question" do not appear therein. [Petition for Discretionary Review reproduced verbatim in Appendix to this Motion to Dismiss, p. 7a]

In the Petition for Discretionary Review, the Appellants made the following assertions as to questions for review and errors committed by the Court of Appeals:

(a) "One of the major purposes of this litigation was to obtain a determination" of the question of whether Wake County Hospital System, Inc., "is an agency of North Carolina Government as defined in the Public Records Act." N.C.G.S. §132-1 (Petition, para. 3) A determination of that question "poses serious legal difficulties." (Petition, para. 4)

(b) "The Court of Appeals failed to properly consider the existence of numerous statutes" of North Carolina—summarized. (Petition, para. 5)

(c) ". . . The North Carolina Court of Appeals failed to properly consider the analogy of" *Martin v. Commissioners of Wake County*, 208 N.C. 54, 156 S.E. 137 (1935) "to the existence of the Wake County Hospital System, Inc. . ." in deciding the pending case. (Petition, para. 6)

(d) "The Court of Appeals erred in its interpretation of two relatively recent cases: *Coats v. Sampson County Memorial Hospital,* 264 N.C. 332, 141 S.E.2d 490 (1965) and *Sides v. Cabarrus County Hospital,* 287 N.C. 14, 213 S.E.2d 297 (1975)." *** "Consideration by the Court of Appeals of the *Sides* case is inappropriate." (Petition, para. 7)

(e) "The Federal Administrative Procedure Act as cited by the Court of Appeals is inappropriate to the circumstances. . ." (Petition, para. 9)

(f) "The Supreme Court should consider the possibility that the language of the Court of Appeals will require the determination that numerous hospitals within the State of North Carolina are public agencies. . ." (Petition, para. 10)

(g) The Court of Appeals "failed to recognize the following Genuine Issues of Material Fact raised by the pleading." [Six alleged issues of facts are then stated.) (Petition, para. 11)

The Appellants in their Petition for Discretionary Review DID NOT make any reference to the question sought to be reviewed by the United States Supreme Court.

"If the [federal] question was presented to lower state courts, but was not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied." Wright and Miller, *Federal Practice and Procedure,* Vol. 16, §4022, p. 697 (1977).

In *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969), the Supreme Court dismissed a writ of certiorari because a federal question "had never been raised, *preserved,* or passed upon in the state courts below." (Emphasis supplied) See also *Webb v. Webb,* 451 U.S. 493, 498-499, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981).

In *F.G. Oxley Stave Co. v. Butler County,* 166 U.S. 648, 653, 17 S.Ct. 709, 710, 41 L.Ed. 1149 (1897), it was pointed out: "... Nor can it be inferred from the opinion of the

supreme court of Missouri that that court was informed by the contention of the parties that any federal right, privilege, or immunity was intended to be asserted. For aught that appears, the state court proceeded in its determination of the cause without any thought that it was expected to decide a federal question."

The North Carolina Supreme Court, without opinion, denied the Appellants' Petition for Discretionary Review of the decision of the Court of Appeals. It is obvious from an examination of that Petition that *the North Carolina Supreme Court was not informed by any contention therein that any federal question was involved.* It is equally obvious that the North Carolina Supreme Court proceeded to act upon (and to deny) the Petition for Discretionary Review "without any thought that it was expected to decide a federal question." Thus, this appeal should be dismissed upon this ground alone.

V. Even If Appellants Had Properly Raised In The State Courts A Federal Constitutional Question As To Privacy Rights, Neither The Hospital System Nor The Three Medical Professional Associations Have Any Federally Recognized Rights Of Privacy.

The Appellants contend that this case "presents a claimed Federal Constitutional right of privacy" (J.S., p. 7), "important enough" to be decided by this Court (J.S., p. 10). They assert that the claimed privacy rights are those of "the three non-Hospital parties to the suits the confidential papers of which were ordered disclosed in this action" and also "the privacy rights of the Hospital and its officers and directors." (J.S., pp. 8-9, footnote 4)

The so-called privacy rights of the Hospital System and its officers and directors are claimed for the first time in the Jurisdictional Statement—and then in a footnote. The privacy rights of the medical professional associations now sought to be claimed have never been pleaded or otherwise presented for decision in any of the State courts. Thus, the statement (J.S., p. 7) that "the claimed federal right was rejected" is inaccurate because it was never raised in the State courts.

The Appellant System and the medical professional associations are corporations. Therefore they have no rights of privacy. *United States v. Morton Salt Company,* 338 U.S. 632, 651-652, 70 S.Ct. 357, 368-369, 94 L.Ed. 401 (1950); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 778, footnote 14, 98 S.Ct. 1407, 1416-1417, 55 L.Ed.2d 707 (1978), rehearing den., 438 U.S. 907 (1978); Restatement of Torts (2d) §652 I, p. 403 (1977); ANNOTATION, 30 ALR 3d 203, 211.

The Appellants in their Jurisdictional Statement have not cited any court decision or other authority holding that an agency of government and its officers have any rights of privacy. Certainly the Appellants have no right to disobey the mandate of a Public Records Statute requiring public inspection of public records in their custody. G.S. §132-1; §132-6.

The Appellants have not cited any court decision holding that a corporation has any right of privacy under the United States Constitution.

The decisions of the Supreme Court cited by the Appellants involving questions of privacy rights all related to personal rights of individuals and were rendered in contexts different from the facts of this case. (J.S., 6-7) *Griswold v. Connecticut,* 381 U.S. 479 (1965) involved the right of marital privacy. *Stanley v. Georgia,* 394 U.S. 557 (1969) involved the right of an individual to possess obscene films in the privacy of his home. *Nixon v. Administration of General Services,* 433 U.S. 425 (1977) involved a former U.S. President's claimed privacy interests, held not to be infringed by the Presidential Recordings and Materials Preservation Act. In *Whalen v. Roe,* 429 U.S. 589 (1977) it was held that a State statutory requirement that disclosures of private medical information, which are often made to doctors, hospital personnel, insurance companies and to public health agencies, be made "to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy." In *Katz v. United States,* 389 U.S. 347 (1967), it was held that an individual's Fourth Amendment rights against unlawful searches and seizures were violated when his telephone conversations while in a public telephone booth were

overheard and recorded by F.B.I. agents by means of an electronic device. None of those decisions is pertinent to the pending case.

Appellants cite two state court cases [*City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 85 Cal. Reptr. 1, 466 P.2d 225 (1970) and *Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State of Florida*, 360 So.2d 83 (Fla. App. 1978)] and assert that "in each the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure." (J.S., p. 7)

The *Young* case involved the constitutional validity of a state statute that required every public officer and candidate for public office and certain executive employees of governmental agencies to file a statement, to be a public record, describing the nature and extent of investments in excess of $10,000 of the officer, employee or candidate and his or her spouse and every minor child thereof. The Court held the statute unconstitutional because it "undertakes an overbroad intrusion into the right of privacy and thereby invalidly restricts the right to seek or hold public office or employment." (466 P.2d at 227) The statute applied only to individuals, their spouses and minor children. It did not apply to corporations. The *Young* case, decided 12 years ago in an entirely different context, has no relevance or significance to the matter before this Court.

Cited Florida Case REVERSED

As a reason that the Supreme Court should decide the pending case, the Appellants (J.S., p. 7) assert that in *Byron, Harless, Schaffer, Reid & Associates, Inc. v. State of Florida* [*ex rel. Schellenberg and Shevin*], 360 So.2d 83 (Fla. App. 1978), "the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure." APPELLANTS FAILED TO INFORM THIS COURT THAT THE SUPREME COURT OF FLORIDA *REVERSED* THE DECISION OF THE FLORIDA COURT OF APPEALS. *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633 (Fla. 1980).

The decision of the Florida Supreme Court supports the Judgment and decision of the North Carolina Courts in the pending case.

In *Shevin*, the Florida Supreme Court held there is no federal constitutional right of privacy to preclude public disclosure of papers prepared by a consulting corporation for a municipal electric authority in connection with the consultant's confidential search for potential applicants for the position of managing director of the electric authority. The consultant contacted numerous individuals and "those individuals interviewed were uniformly assured that the interview was confidential." The court held that the consulting corporation was an "agency" to which the Florida Public Records Law applied and that the papers (*including* resumes and letters from potential applicants for the position, memoranda and other records containing information about prospective applicants, but *excluding* rough drafts) were "public records" subject to public inspection under the Florida Public Records Statute.

The Florida Supreme Court (379 So.2d 636-638) discussed four of the five U.S. Supreme Court decisions cited by the Appellants in their Jurisdictional Statement (*Griswold, Nixon, Katz* and *Whalen*), J.S. pp. 6-7, and concluded there does not exist "a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." (379 So.2d at 638) The Court cited (same page) *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) as controlling.

The Appellees here submit that the principles enunciated by the Supreme Court in *Paul* are applicable to the pending case, even stronger so because *Paul* involved constitutional rights of privacy claimed by an individual. Here the rights are claimed for corporations and a government agency.

The Appellants' contention that they have standing to claim privacy rights on behalf of non-parties (J.S., pp. 8-9) is not persuasive. See *Tileston v. Ullman*, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943); *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). This is particularly so in view of the fact alluded to by the Appellants (J.S., p. 5, footnote 2) that the three medical professional associations

made formal written statements filed with the North Carolina Court of Appeals indicating no desire to become parties to this action and waiving that right. (See Appendix to this Motion to Dismiss, p. 6a for verbatim reproduction of the statement.)

In an effort to support a contention that "the facts in this case show the existence of a 'legitimate expectation of privacy' " (J.S., p. 7) and a later contention that "when most of the documents ordered disclosed in this case were generated, there was a reasonable basis for an expectation by all involved that they were private documents that would remain private" (J.S., p. 9), the Appellants not only make statements that confuse the two North Carolina statutes involved (the Open Meetings Statute and the Public Records Statute) [J.S., pp. 8-9], but they FAIL TO BRING TO THE ATTENTION OF THIS COURT A NORTH CAROLINA STATUTE THAT WAS ENACTED IN *1978* AND BECAME EFFECTIVE ON OCTOBER 1, *1978*. That fact, not disclosed by the Appellants, destroys the basis of their arguments on this point by CONTRADICTING AND RENDERING FALSE APPELLANTS' STATEMENT (J.S., p. 7): "It was not until October 1, *1979*, that North Carolina G.S. 143-318 was amended to apply to hospitals such as the Hospital in this action." (Emphasis added) [See Appendix to this Motion to Dismiss, p. 2a, where the 1978 and the 1979 statutes are reproduced.]

It follows, therefore, that arguments in the Jurisdictional Statement (pp. 7-10), attempting to show the existence of a "legitimate expectation of privacy," are made upon a false premise since the Hospital System became a public body on October 1, *1978*, instead of October 1, *1979*. The three lawsuits that were settled in August and December *1979* were commenced on 19 December *1978*, almost three months after the Hospital System became a public body under G.S. §143-318.2(b). Furthermore, the Public Records Statute, G.S. §132-1, was enacted in 1935 and was last amended in 1975. (See J.S. Appendix, 22a.) It is under the Public Records Statute that the North Carolina courts held that the Hospital System was an agency of North Carolina government and that its records are "public records." Certainly, medical professional associations dealing with "an agency of government" and "a public body"

could not reasonably claim a "legitimate expectation of privacy" in their dealings with the agency of government. They knew or should have known that any agreement that the settlement terms would not be publicly disclosed was in violation of the Public Records Statute. An agency of government has no power to contract that it will not comply with a State statute that requires it to permit public access to its records. *Doe v. Salmon,* 135 Vt. 443, 378 A.2d 512 (1977); *Robles v. Environmental Protection Agency,* 484 F.2d 843, 845 (4 Cir., 1973); *Petkas v. Staates,* 501 F.2d 887, 889 (U.S. App., D.C., 1974).

Furthermore, statutory provisions in effect at the time an agreement is made become a part thereof, and contract provisions in conflict with the statute are void. *Wright v. Fidelity and Casualty Company,* 270 N.C. 577, 582, 155 S.E.2d 100, 104 (1967); *Wood v. Lovett,* 313 U.S. 362, 370, 61 S.Ct. 983, 987, 85 L.Ed. 1404 (1941).

Any claimed rights of privacy to preclude public access to the settlement records "fade" in the terminology of the United States Supreme Court in *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 494-495, 95 S.Ct. 1029, 1046, 43 L.Ed.2d 328 (1975);

> Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record. . .

Appellees reiterate that there are no federal constitutional rights of privacy to be asserted here, even if the Appellants had timely and properly raised any federal question on that point in the North Carolina courts (again denied).

VI. The Appeal Does Not Present A Substantial Federal Question; The State Court Judgment Rests On Adequate And Independent State Grounds; And The Appeal Is Frivolous.

The Supreme Court will not decide federal constitutional issues raised before it for the first time on review of state court

decisions. *Webb v. Webb,* 451 U.S. 493, 498, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981), and cases cited; 28 U.S. Code §1257(2); Rule 15. As hereinbefore demonstrated, the Appellants did not timely, explicitly and properly present any constitutional or other federal question to any of the North Carolina courts.

Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review by the United States Supreme Court. *Michigan v. Tyler,* 436 U.S. 499, 512, footnote 7, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486 (1978), and cases cited.

The North Carolina courts held as a matter of state law that the corporate defendant-appellant is an agency of government and that its records sought to be examined by the Appellees are public records open to public inspection under G.S. §132-1 and §132-6.

The Supreme Court lacks jurisdiction to review cases that involve only questions of state law. Thus, the "Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945); *Wolfe v. State of North Carolina,* 364 U.S. 177, 195, 80 S.Ct. 1482, 1492, 4 L.Ed.2d 1650 (1960). Adequate, independent state grounds exist here.

In their Petition for Discretionary Review filed with the North Carolina Supreme Court (paragraph 7), the Appellants contend that "The Court of Appeals erred in its interpretation of two relatively recent cases" (citing the North Carolina Supreme Court cases). However, an objection by an appellant "to the State Supreme Court's application of state law does not raise a federal question appropriate for review by the United States Supreme Court." *Agins v. City of Tiburon,* 447 U.S. 255, 259-260, footnote 6, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

By reading the pleadings (R 2-19), the Superior Court Judgment (R 27-31), the opinion of the North Carolina Court

of Appeals (55 N.C. App. 1, 284 S.E.2d 542), the Appellants' Assignments of Error filed in the State Court of Appeals (R 34-38), their Petition for Discretionary Review filed with the North Carolina Supreme Court (Motion to Dismiss, Appendix, 7a), and the Appellants' Jurisdictional Statement, it becomes clear that this appeal is frivolous, and in the words of Mr. Justice Brown in *Chicago, Indianapolis, & Louisville Railway Co. v. McGuire,* 196 U.S. 128, 133, 25 S.Ct. 200, 201, 49 L.Ed. 413 (1904):

> ... This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court *as an afterthought,* when all other resources of litigation have been exhausted. (Emphasis added)

The Appellants have not met their burden of demonstrating that a substantial federal question is presented for review by the Supreme Court, as required by the rules and decisions of this Court. Rule 15.1(h); Rule 16.1(b); *Bailey v. Anderson,* 326 U.S. 203, 207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *Zucht v. King,* 260 U.S. 174, 177, 43 S.Ct. 24, 25, 67 L.Ed. 194 (1922); Wright and Miller, *Federal Practice and Procedure,* Vol. 16, p. 636, §4014 (1977).

VII. If The Supreme Court Should Determine That The Appeal Was Improvidently Taken And Should Consider It As A Petition For Certiorari, The Petition Must Be Denied For Want Of A Timely, Explicitly And Properly Raised And Preserved Federal Question.

If the Supreme Court should determine that this appeal has been improvidently taken and should regard the attempted appeal as a petition for a writ of certiorari under 28 U.S. Code §2103, then, as so treated, it should be denied because, as required by 28 U.S. Code §1257(3) and Rule 21.1(h) the Appellants have failed to show that in the State courts the validity of a state statute has been drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or that any title, right, privilege or immunity has been specially set up or claimed under the Constitution, treaties or statutes of, or commission held or

authority exercised under, the United States. In other words, treated as a Petition for Certiorari, the Petition must be denied for want of a timely, explicitly, and properly raised and preserved federal question. *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) and cases cited.

Appellants have not shown that the North Carolina "court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." Appellants have not shown that a North Carolina appellate court in these proceedings "has decided an important question of federal law which has not been, but should be, settled by this [Supreme] Court, or has decided a federal question in a way in conflict with applicable dicisions of this court." Rule 17.

The decision of the North Carolina courts that the corporate appellant is an agency of government and that its records sought to be examined by the Appellees are public records under the Public Records Statute is in accord with the decisions of the courts of other states under comparable facts and circumstances. *Glick v. Trustees of Free Public Library*, 2 N.J. 579, 67 A.2d 463 (1949); *Moberly v. Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (Md. App. 1975); *Water Works Board v. White*, 281 Ala. 357, 202 So.2d 721 (1967); *Cavalier v. McCue*, 58 A.D.2d 729, 396 N.Y.S.2d 299 (1977); *Atchison v. Hospital Authority of City of St. Mary's*, 245 Ga. 494, 265 S.E.2d 801 (1980); *Griffin-Spaulding County Hospital Authority v. Radio Station WKEU*, 240 Ga. 444, 241 S.E.2d 196 (1978); *Cleveland Newspapers, Inc. v. Bradley County Memorial Hospital Board of Directors* (Tenn. App., *cert. den.*, Tenn.) 621 S.W.2d 763 (1981); *Schwartzman v. Merritt Island Volunteer Fire Department* (Fla. App.) 352 So.2d 1230 (1977); *cert. den.*, Fla., 358 So.2d 133 (1978); *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633 (Fla. 1980).

The arguments hereinbefore made and the authorities cited on the lack of jurisdiction of the Supreme Court to allow the appeal are equally applicable and pertinent to the contention of the Appellees that there are insufficient grounds to warrant review of the judgment and decisions of the North Carolina courts on certiorari.

CONCLUSION

The Appellants have attempted an unwarranted appeal not within the jurisdiction of the Supreme Court for the reasons hereinbefore asserted. Therefore, the case should not be set for argument, but should be dismissed. Likewise, if the appeal papers should be treated as a petition for certiorari, the writ should be denied for the reasons hereinbefore stated.

Respectfully submitted,

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June 22, 1982

APPENDIX

APPENDIX TO MOTION TO DISMISS

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APPENDIX TO MOTION TO DISMISS

FEDERAL STATUTES

28 United States Code, § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

28 United States Code, § 2103

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

June 25, 1948, c. 646, 62 Stat. 962; Sept. 19, 1962, Pub.L. 87-669, § 1, 76 Stat. 556).

NORTH CAROLINA STATUTES

Session Laws of North Carolina, 1977 (Session 1978), Chapter 1191—Pertinent Section Rewriting G.S. § 143-318.2 and effective date Section

Section 1. * * *

Sec. 2. G.S. 143-318.2 is rewritten to read as follows:

"§ 143-318.2. *All official meetings open to the public*—(a) Except as provided in G.S. 143-318.3, G.S. 143-318.4, and G.S. 143-318.5, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, 'public body' means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members. . .

* * *

In addition, 'public body' means a committee of a public body and the governing board of a 'public hospital', as defined in G.S. 159-39. This provision shall not apply to committees which are not policy making bodies of public hospitals.

* * *

Sec. 9. Sections 1,2,3,4,5,6, and 7 of this act shall become effective on October 1, 1978. Section 8 and 9 are effective upon ratification.

In the General Assembly read three times and ratifies, this the 16th day of June, 1978. (Emphasis added)

Session Laws of North Carolina, 1979, Chapter 655—Pertinent Section enacting G.S. § 143-318.12 (changed in codification to G.S. § 143-318.10) and effective date Section

Section 1. G.S. Chapter 143, Article 33B is repealed, and a new Article 33C is enacted, to read as follows:

"ARTICLE 33C.
"Meetings of Public Bodies.

* * *

"§ 143-318.12. *All official meetings of public bodies open to the public*—(a) Except as provided in G.S. 143-318.13, G.S. 143-318.17, and G.S. 143-318.20, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, 'public body' means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members; . . .

* * *

In addition, 'public body' means (1) the governing board of a 'public hospital' as defined in G.S. 159-39 and (2) each committee of a public body, except a committee of the governing board of a public hospital if the committee is not a policy-making body. (Emphasis added)

* * *

Sec. 4. This act shall become effective October 1, 1979.

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 10—Exceptions and Assignments of Error in Record on Appeal

(a) Function in Limiting Scope of Review. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set

out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) Exceptions.

(1) General. Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) Jury Instruction; etc. (omitted)

(c) Assignments of Error—Form. The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to

which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) Exceptions and Cross Assignments of Error by Appellee. (omitted)

NORTH CAROLINA RULES OF CIVIL PROCEDURE

(Embodied in General Statutes § 1A-1)

Rule 8(c)—General Rules of Pleadings

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Rule 12(b)—Defenses—How Presented

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading,whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue or division,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a necessary party.

"DECLARATION AND WAIVER" EXECUTED BY EACH OF THE THREE MEDICAL PROFESSIONAL ASSOCIATIONS AND FILED WITH THE NORTH CAROLINA COURT OF APPEALS AS A PART OF THE PROCEEDINGS BELOW

Each Declaration and Waiver was substantially in form and content as that executed by Morton Meltzer, M.D., P.A. (by Morton Meltzer, President), which was as follows (bearing the North Carolina Court of Appeals caption and title of the case):

"The undersigned, Morton Meltzer, M.D., P.A., the plaintiff in a civil action formerly pending in the General Court of Justice, Superior Court Division, Wake County, North Carolina, against Wake County Hospital System, Inc., which action was dismissed after settlement was made between the parties, hereby declares that he has no desire to become a party to the above-entitled action now on appeal to the North Carolina Court of Appeals, and hereby waives the right (if any) to become a party and I authorize counsel for the plaintiffs in this action to file this Declaration and Waiver with the North Carolina Court of Appeals."

Petition for Discretionary Review Filed by Appellants in North Carolina Supreme Court

(Denied 3 March 1982)

No. 162PC
TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1981

NEWS & OBSERVER PUBLISHING COMPANY, *et al*

v. From Wake

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al*

PETITION FOR DISCRETIONARY REVIEW UNDER GS 7A-31

(Filed: 15 December 1981)

Wake County Hospital System, Inc., and all other Defendants herein hereby petition the Supreme Court of North Carolina pursuant to NC GS 7A-31 to certify for discretionary review the judgment of the North Carolina Court of Appeals affirming the judgment of the Honorable Thomas H. Lee, Superior Court Judge, that the Defendant be required to allow inspection of certain documents in the possession of the Wake County Hospital System, Inc., by virtue of NC GS 132-1 et seq. except those communications which are specifically exempted from the act by NC GS 132-1.1.

In support hereof, the petitioner shows to the court that:

1. This action was commenced by the News & Observer Publishing Company and others associated with the company for the purpose of obtaining access to certain documents alleged to be in the possession of the Wake County Hospital System, Inc. Those documents involved the settlement of certain contractual claims between the hospital and certain physicians who were at one time in a contractual relationship with the Wake County Hospital System, Inc. The complaint was later amended to request the examination of certain expense accounts of the Board of Trustees and Chief Executive Officer of the Wake County Hospital System, Inc.

2. Wake County Hospital System, Inc. is a private non-profit corporation chartered under NC GS 55A-1 et seq., and operates in all respects as a general business corporation under the laws of the State of North Carolina. Wake County Hospital System, Inc. is unique, however, in that it has a continuing and ongoing relationship with the County of Wake related to the utilization of certain facilities owned by the County of Wake and the provision of indigent care for Wake County and other county residents.

3. One of the major purposes of this litigation was to obtain a determination of whether or not a private non-profit corporation which leases county-owned facilities for a nominal rate and which provides care for medically indigent persons in return for contributions from the general fund of the county to its operating fund is an agency of North Carolina Government as defined in the Public Records Act, to mean " . . . [E]very public office, public officer or official (state or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the state or of any county, unit, special district or other political subdivision of government." NC GS 132-1 (1981).

4. A determination of whether or not the Wake County Hospital System, Inc., as a private non-profit corporation, could be an agency of Wake County poses serious legal difficulties. For the Wake County Hospital System, Inc., however, and its progeny across the state, it poses the more serious questions of

county agency status in general, for example: to what extent is the defense of governmental immunity now available to the Wake County Hospital System, Inc.?; are all county employees required to participate in the state personnel system?; if so, what is the status of the current private retirement system maintained by Wake County Hospital System, Inc.?; should the County now begin to exercise actual control over the operations of Wake County Hospital System, Inc.?

5. The Court of Appeals failed to properly consider the existence of numerous statutes which give the authority to a particular county to contract out the operation of its hospital system and which recognize the power of a county to contract for the provision of hospital services through a non-profit corporation.

a. NC GS 131-9 provides that the Board of Trustees may, jointly with the governing board of the county, lease any hospital established by the county pursuant to this article to any non-profit association or corporation upon such terms and subject to such conditions as will carry out the purposes of the article.

b. Counties and other subdivisions of the state are also authorized to elect to operate public hospitals through public units of government called authorities [NC GS Sec. 131-93] or to elect to contract out such administration to any "public agency" or to "any individual, private organization or non-profit association." NC GS Sec. 131-98(a)(22).

c. Legislative intent to distinguish between public agencies and private corporations in hospital administration is further confirmed, by specific definition, in NC GS Sec. 131-126.18(1), (4), (5), and by authorization to cooperate with "public and private agencies" as the County of Wake did in this case, NC GS Sec. 131-126.19, and by express authority to allow counties to contract or make public hospital arrangements "with any other municipality or other public agency of this or any other state or the United States or with any individual, private organization or non-profit association . . . ." NC GS Sec. 131-126.20(c).

d. The General Assembly has exhibited a plain and clear attempt to distinguish, diametrically contrary to the decision below, leases of hospital facilities to "public or non-profit" agencies and the public operation of hospitals, NC GS Sec. 131-145.

e. Additionally, the North Carolina Open Meetings Law, NC GS Sec. 143-318.1 et seq. recognizes the specific distinction between those hospitals which are public, those which are purely private, and those which are private non-profit corporations operating leased county facilities. This statute specifically includes hospitals leased to non-profit corporations such as Wake County Hospital System, Inc. under its definition of public bodies. This amendment was made in 1979, very close in time to the amendment to the Public Records Law, GS 132-1, at which time the General Assembly failed to make a similar amendment to cover hospitals corporately operated such as the Wake County Hospital System, Inc.

6. Contracting out the use of publicly owned hospital facilities is perfectly appropriate and in concert with the law of North Carolina.

Martin v. Commissioners of Wake County, 208 NC 54, 156 SE 137 (1935) specifically approved a contract which provided county payments of $10,000.00 per year for a term of 35 years to be paid to Rex Hospital, a private non-profit corporation, for care of the sick and indigent. One of the underlying bases for this agreement was to enable Rex Hospital to construct a new facility in order to maintain its license and continue to provide care to the community in general. The North Carolina Court of Appeals failed to properly consider the analogy of that case to the existence of the Wake County Hospital System, Inc. as a private non-profit corporation organized and operating under Chapter 55A of the North Carolina General Statutes and providing indigent care in return for which the following consideration is received: 1) utilization of facilities at a greatly reduced cost; 2) payment of an annual appropriation from the County of Wake; and 3) the cooperation of the County of Wake in long-term financing of capital improvements to the

Wake County Hospital System, Inc. via the use of county issued industrial revenue bonds.

7. The Court of Appeals erred in its interpretation of two relatively recent cases; *Coats v. Sampson County Memorial Hospital,* 264 NC 332, 141 SE 2d 490 (1965), and *Sides v. Cabarrus County Hospital,* 287 NC 14, 213 SE 2d 297 (1975). The factual dispute at issue in *Coats* involved venue for civil litigation filed against Sampson County Memorial Hospital by a supplier of materials. The suit was initially brought in Harnett County, the residence of the Plaintiff. The court, through Justice Sharp, agreed that a private non-profit hospital leasing county facilities was a public agency for the purposes of venue *only.* The Court of Appeals noted that *Coats* dealt with the limited issue of venue but failed to properly interpret the significance of the limited holding. In addition, it should be recognized that this case was decided in 1964, well before many of the statutory enactments referenced in this case by Defendant Wake County Hospital System, Inc. in support of its contention that it has a right to exist and be recognized as a private non-profit corporation.

Consideration by the Court of Appeals of the *Sides* case is inappropriate. *Sides* begins with the question: "Was Cabarrus Memorial Hospital a political subdivision of Cabarrus County or of the State of North Carolina?" It should be obvious that the *Sides* case is totally inappropriate in attempting to determine whether or not a private non-profit corporation is an agency of a county.

8. The Court of Appeals devotes a substantial amount of the opinion to a discussion of the provisions of the bond order currently existing in the form of an operating agreement between the County of Wake and the Wake County Hospital System, Inc. This bond order exists in order to finance certain capital improvements of the hospital system which were necessary in order to maintain the facilities and services of the hospital system. Again, in this respect, the bond order is not unlike the accommodation provided to Rex Hospital in *Martin v. Commissioners of Wake County,* 208 NC 54, 156 SE 137 (1935). The degree of ultimate supervision provided by the operating agreement is only that degree of supervision neces-

sary in order to facilitate the issuance of these bonds through the County of Wake secured by the revenues of the Hospital System. If this arrangement will result in private non-profit hospitals being determined to be agencies of counties, one of the most important and possibly the last major capital resource will have been removed for the financing of long-term indebtedness of hospitals. The demise of this particular source of long-range capital funding will do much to increase the current turnover of private non-profit and county-owned hospitals in rural areas to large private proprietary hospital chains.

9. The Federal Administrative Procedure Act as cited by the Court of Appeals is inappropriate to the circumstance. The Federal Administrative Procedure Act's section on freedom of information [5 USC 552A] contains a substantial number of exceptions, including an entire statutory amendment [552A] which specifically relates to the protection of personal privacy. The position of the Court of Appeals that it is for the legislature to make any adjustments or exceptions in the case of the North Carolina Public Records Act is entirely inconsistent with its utilization of the Federal Administrative Procedure Act which does, in fact, provide such an opportunity for claiming statutory exemptions.

10. The Supreme Court should consider the possibility that the language of the Court of Appeals will require the determination that numerous hospitals within the State of North Carolina are public agencies. Such a determination can have serious implications on the long-term financing of health care institutions, on the management of health care services by county agencies, on the provision of health care services by counties, on the status of private retirement systems currently existing as formed by private non-profit hospitals in the state, on non-health care services which have traditionally been contracted out; for example: trash collection, water quality analysis, public utilities, TV cable franchises, and the like. To allow continued confusion with regard to these unresolved issues could seriously hamper the development of public and quasi-public services in the State of North Carolina.

11. The court failed to recognize the following Genuine Issues of Material Fact raised by the pleading:

a. Whether or not the terms of the settlement of the claim between Dr. Meltzer and the corporate defendant are required by statute to be entered into the minutes of the corporate defendant?

b. Whether or not the failure to enter terms of the settlement in said minutes was a violation of GS 143-318.13(a)(4)?

1. How could a trial court adjudicate what period of time was a "reasonable time after settlement" without *any evidence.*

2. News and Observer in its brief acknowledges that "there is no showing as to what was a reasonable time after the settlements were completed within which the defendant directions were required" to enter the terms in the minutes.

3. Issue raised in pleadings—paragraph 23 of complaint and answer.

c. Whether or not disclosure of settlement would frustrate the purpose of the executive session?

d. Whether or not plaintiff's request for information was for a public purpose?

e. Would disclosure of terms of settlement force the defendants to compromise privileged information?

f. Whether or not the information is a written communication made within the scope of the attorney-client relationship and not open to inspection under GS 132-1.1?

Summary Judgment was improvidently granted, and this lawsuit should be returned to the trial court for a determination of the genuine issues raised by the pleadings.

WHEREFORE, the Petitioner respectfully prays the judgment of the Court of Appeals herein, a copy of which is attached hereto, be certified for discretionary review by the North Carolina Supreme Court. This the 15 day of December, 1981.

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No. 81-2213

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*, *Appellants*,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals Of The State Of North Carolina

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

This response is filed to point out a few of the obvious problems contained in the Motion To Dismiss filed by Appellees in this case.

1. Appellees make much of the fact that the Federal Constitutional issue was not raised in any document before the North Carolina trial court, the Superior Court. Yet nowhere do they deny Appellants' statement (Jurisdictional Statement p. 5) that the Federal Constitutional issue was raised in oral argument by the Appellants before the Superior Court. Appellees go on to make the naked assertion that the fact that "the constitutional question *was* 'argued' in the Superior Court—unsupported by any documentary evidence in the record—is not sufficient to raise a federal constitutional question." (emphasis supplied) (Motion To Dismiss, p. 14.) In addition to not contesting that it was so "argued," Appellees cite no authority for their assertion that argu-

ment of a Federal Constitutional issue at the trial level is an insufficient manner of raising the issue. Moreover, Appellees' argument is contrary to this Court's ruling in *Webb* v. *Webb*, 451 U.S. 493 (1981), that the Court has "not insisted on such an inflexible specificity." *Id.* at 501. Rather, the Court has made clear that the requirement that a federal claim be raised in state courts is satisfied "if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Id.* at 496-97. We respectfully suggest that the mere statement of Appellees' proposition to the contrary is sufficient to show its absurdity.

2. Appellees also contend vigorously that Appellants failed to raise the Constitutional issue presented here in its Assignment of Error to the North Carolina Court of Appeals. Appellees, demonstrating commendable candor, tell this Court (Motion To Dismiss, p. 17) that Appellants' Assignment of Error No. 5 reads, "in potential conflict with Constitutional rights of patients, employees, business associates, and all persons entitled to privacy concerning private records . . . ." We respectfully submit that that is a clear raising of the Constitutional right of privacy by any reasonable construction of the English language. Appellees, however, would like to have had a specific Constitutional provision recognizing the right of privacy. But, as this Court well knows, there is no such provision; rather, the right arises from the "penumbra" of several Constitutional provisions. We respectfully suggest that the language used in Assignment of Error No. 5 is a sufficient reply to Appellees' argument that the issue was not raised. [1]

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[1] *See*, this Court's recent statement in *Webb* v. *Webb*, 451 U.S. 493, 501 (1981):

> Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the feder-

3. It is true that the Constitutional argument was not raised explicitly in the Petition for Discretionary Review filed in the North Carolina Supreme Court, and that better practice would call for explicit expression of the argument in that document. But the fact remains that the North Carolina Supreme Court did not review this case and the issue was explicitly raised before every North Carolina Court—trial and appellate—which did review this case. Moreover, the Petition for Discretionary Review was presented in the context of the entire record before the North Carolina Supreme Court, including the language of Assignment of Error No. 5. We respectfully submit that this situation satisfies the review requirements of each of the many cases that Appellees have cited and quoted to this Court.

4. Appellees further contend that the decision of the North Carolina Court of Appeals rests upon an adequate and independent state ground (Motion To Dismiss, pp. 25-27). The only state ground presented by Appellees is that the Court of Appeals held as a matter of state law

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> al statute on which they rely, we have not insisted on such inflexible specificity. . . . At the minimum, however, there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

(Emphasis in the original.) That Appellants raised a Federal Constitutional issue before the state courts is beyond doubt. *See, e.g.*, Appellants' Court of Appeals brief p. 32 ("rights of privacy protected under the First Amendment of the United States Constitution. GRISWOLD v. CONNECTICUT, 381 U.S. 479 . . . (1956) (*sic*)" and other decisions of this Court), p. 33 ("expectation of privacy was such that it must be observed in an ordered society. Cf. KATZ v. UNITED STATES, 389 U.S. 347 . . . (1967)"), pp. 36-37 ("reasonable expectation of privacy . . . KATZ v. UNITED STATES, *supra*").

that the Hospital was a state agency and that its records were open to inspection. Appellants agree that that is what the Court of Appeals held. But that holding does not meet Appellants' argument before the Superior Court and before the Court of Appeals—including Assignment of Error No. 5—that such a holding violates the Constitutional right to privacy. Appellees also contend that Appellants' failure to raise the federal issue properly is another adequate state ground for affirmance. The short answer is that the North Carolina Courts did *not* so hold, and, indeed Appellees do not contend that the North Carolina courts so ruled. Of course, as shown above, the federal issue was in fact raised before every North Carolina court which has reviewed this case.

5. Appellees correctly advise this Court that the Florida Supreme Court has reversed the ruling of the Florida District Court of Appeals which the Jurisdictional Statement in this case (p. 7) presented as one of two examples in which the Federal Constitutional right to privacy was held to supercede a state statute that would have forced disclosure of information. *Shevin* v. *Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980), reversing *Byron, Harless, Schaffer, Reid and Associates, Inc.* v. *State of Florida*, 360 So.2d 83 (Fla. Dist. Ct. App. 1978). Counsel regrets that this information was not presented in the Jurisdictional Statement.

Yet, the point of the Florida Court of Appeals case has not been vitiated. The Florida Supreme Court held that there was no legitimate expectation of privacy at stake in that case, not that Florida statutes could eliminate such an expectation of privacy. Here the expectation of privacy is clear: communication about pending litigation, including communication between client and counsel. Once

that fact is established, the Florida Court of Appeals' holding that the Federal Constitution does not allow a state law to abrogate that right is a correct one which the Florida Supreme Court does not reverse.

6. Finally, Appellees argue that North Carolina law exempts written communications with counsel from disclosure under the North Carolina Public Record Law. Appellees contend (Motion To Dismiss, p. 4) that North Carolina G.S. § 132-1.1 "is an affirmative exemption of written communications of counsel . . . from 'public records' as defined by G.S. § 132-1" and, here, presumably, from a duty to disclose. This is a curious contention for several reasons: first, if true it would be a complete answer to this entire case and obviate the next 24 pages of Appellees' Motion To Dismiss; second, this apparently complete answer to Appellants' contentions does not again appear in the Motion To Dismiss. The reason for both of these situations, we respectfully submit, is apparent from the language of G.S. § 132-1.1 itself which provides no such expectation but only a hiatus of three years:

> provided, however, that such written communication and copies thereof shall become public records as defined in G.S. 132.1 three years from the date such communication was received by such public board, council, commission or other governmental body.

Thus, Appellees' contention is completely contrary to the explicit statutory language.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, it is respectfully urged that the Motion To Dismiss be denied.

Respectfully submitted,

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